Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

1 June 2022 *

(Economic and monetary union – Banking Union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Right to be heard – Delegation of power – Right to property – Obligation to state reasons – Articles 18 and 20 and Article 21(1) of Regulation (EU) No 806/2014)

In Case T-510/17,

Antonio Del Valle Ruíz, residing in Mexico (Mexico), and the other applicants whose names are listed in the annex, [1] represented by J. Pobjoy, Barrister, B. Kennelly QC, and S. Walker, Solicitor,

applicants,

v

European Commission, represented by L. Flynn and A. Steiblytė, acting as Agents,

and

Single Resolution Board (SRB), represented by J. King and M. Fernández Rupérez, acting as Agents, and by B. Meyring, S. Schelo, F. Fernández de Trocóniz Robles, T. Klupsch and S. Ianc, lawyers,

defendants,

supported by

Kingdom of Spain, represented by L. Aguilera Ruiz and J. Rodríguez de la Rúa Puig, acting as Agents,

by

European Parliament, represented by L. Visaggio, J. Etienne, M. Menegatti, M. Sammut, L. Stefani and M. Martínez Iglesias, acting as Agents,

by

* Language of the case: English.

[1] The list of the other applicants is annexed only to the version sent to the parties.

Council of the European Union, represented by A. de Gregorio Merino, J. Bauerschmidt, A. Westerhof Löfflerová and H. Marcos Fraile, acting as Agents,

and by

Banco Santander, SA, established in Santander (Spain), represented by J. Rodríguez Cárcamo, A. Rodríguez Conde, D. Sarmiento Ramírez-Escudero, lawyers, and G. Cahill, Barrister,

interveners,

APPLICATION based on Article 263 TFEU for annulment of Decision SRB/EES/2017/08 of the Executive Session of the SRB of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, SA, and for annulment of Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (OJ 2017 L 178, p. 15),

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of M. van der Woude, President, M. Jaeger, V. Kreuschitz, G. De Baere (Rapporteur) and G. Steinfatt, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 21 June 2021,

gives the following

Judgment

Legal framework

1 Following the 2008 financial crisis, it was decided that a banking union should be set up in the European Union, underpinned by a comprehensive and detailed single rulebook for financial services, valid for the internal market as a whole and composed of a single supervisory mechanism and new frameworks for deposit insurance and resolution.

2 The first stage towards setting up the banking union consisted of the establishment of a single supervisory mechanism (SSM) by Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63). According to recital 12 of that regulation, an SSM should ensure that the European Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations. To that end, Regulation No 1024/2013 confers specific tasks on the European Central Bank (ECB) concerning policies relating to the prudential supervision of credit institutions with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the European Union and each Member State.

3 Thereafter, Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190) was adopted. Recital 1 of that directive states the following:

'The financial crisis has shown that there is a significant lack of adequate tools at Union level to deal effectively with unsound or failing credit institutions and investment firms … Such tools are needed, in particular, to prevent insolvency or, when insolvency occurs, to minimise negative repercussions by preserving the systemically important functions of the institution concerned. During the crisis, those challenges were a major factor that forced Member States to save institutions using taxpayers' money. The objective of a credible recovery and resolution framework is to obviate the need for such action to the greatest extent possible.'

4 The objective of Directive 2014/59 is to establish common rules for minimum harmonisation of national provisions governing the resolution of banks in the European Union and provides for cooperation between resolution authorities for deficiencies in cross-border banks. In that regard, Directive 2014/59 provides, inter alia, in Article 3(1), that each Member State is to designate one or, exceptionally, more resolution authorities that are empowered to apply the resolution tools and exercise the resolution powers.

5 However, given that, first, Directive 2014/59 did not lead to the centralisation of decision making in the field of resolution, that it essentially made resolution tools and common resolution powers available to the national authorities of each Member State, and that it left them a margin of discretion as regards the use of those tools and the use of national financing arrangements for resolution, and that, second, that directive did not completely avoid the taking of separate and potentially inconsistent decisions by Member States regarding the resolution of cross-border groups, it was decided to put in place a Single Resolution Mechanism (SRM).

6 Thus, the second stage towards the creation of the banking union consisted in the adoption of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

7 Recital 12 of Regulation No 806/2014 states:

'Ensuring effective resolution decisions for failing banks within the Union, including on the use of funding raised at Union level, is essential for the completion of the internal market in financial services. Within the internal market, the failure of banks in one Member State may affect the stability of the financial markets of the Union as a whole. Ensuring effective and uniform resolution rules and equal conditions of resolution financing across Member States is in the best interests not only of the Member States in which banks operate but also of all Member States in general as a means of ensuring a level competitive playing field and improving the functioning of the internal market. Banking systems in the internal market are highly interconnected, bank groups are international and banks have a large percentage of foreign assets. In the absence of the SRM, bank crises in Member States participating in the SSM would have a stronger negative systemic impact also in non-participating Member States. The establishment of the SRM will ensure a neutral approach in dealing with failing banks and therefore increase stability of the

banks of the participating Member States and prevent the spill-over of crises into non-participating Member States and will thus facilitate the functioning of the internal market as a whole. The mechanisms for cooperation regarding institutions established in both participating and non-participating Member States should be clear, and no Member State or group of Member States should be discriminated against, directly or indirectly, as a venue for financial services.'

8 Under the first paragraph of Article 1 of Regulation No 806/2014, the purpose of that regulation is to establish uniform rules and a uniform procedure for the resolution of the entities defined in Article 2, which are established in the participating Member States, namely banks whose home supervisor is the ECB or the national competent authority in Member States whose currency is the euro or in Member States whose currency is not the euro which have established a close cooperation in accordance with Article 7 of Regulation No 1024/2013 (see recital 15 of Regulation No 806/2014).

9 The second paragraph of Article 1 of Regulation No 806/2014 provides that those uniform rules and that uniform procedure are to be applied by the Single Resolution Board (SRB) established in accordance with Article 42 of that regulation, together with the Council of the European Union and the European Commission, and the national resolution authorities, within the framework of the SRM established by that regulation. It is also provided that the SRM is to be supported by a single resolution fund (SRF).

10 Pursuant to Article 16(1) of Regulation No 806/2014, the SRB is to decide on a resolution action in relation to a financial institution established in a participating Member State, where the three conditions laid down in Article 18(1) of that regulation are satisfied.

11 The first condition requires that the entity is failing or is likely to fail. The assessment of that condition is carried out by the ECB, after consulting the SRB, or by the SRB, and is deemed to be satisfied if the entity is in one or more of the situations listed in Article 18(4) of Regulation No 806/2014.

12 The second condition requires there to be no reasonable prospect that any alternative private sector measures or supervisory action would prevent its failure within a reasonable time frame.

13 The third condition requires that a resolution action is necessary in the public interest, that is to say that it is necessary in order to achieve one or more of the resolution objectives, and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.

14 Article 14 of Regulation No 806/2014 defines the resolution objectives as follows: to ensure the continuity of critical functions; to avoid significant adverse effects on financial stability, in particular by preventing contagion; to protect public funds by minimising reliance on extraordinary public financial support; to protect depositors and investors; and to protect client funds and client assets.

15 Article 20(1) of Regulation No 806/2014 provides that, before deciding on resolution action or the exercise of the power to write down or convert relevant capital instruments, the SRB must ensure that a fair, prudent and realistic valuation of the assets and liabilities of the entity concerned is carried out by a person independent from any public authority, including the SRB and the national resolution authority, and from the entity concerned.

16 According to Article 20(15) of Regulation No 806/2014, the valuation is to be an integral part of the decision on the application of a resolution tool or on the exercise of a resolution power or the decision on the exercise of the write-down or conversion power of capital instruments.

17 Where the conditions laid down in Article 18(1) of Regulation No 806/2014 are satisfied, the SRB is to adopt a resolution scheme.

18 When acting under the resolution procedure, the SRB, the Council and the Commission must ensure that the resolution action is taken in accordance with certain principles set out in Article 15 of Regulation No 806/2014, which include the principle that the shareholders of the institution under resolution are to bear first losses and the principle that no creditor is to incur greater losses than would have been incurred if the entity covered by the resolution action had been wound up under normal insolvency proceedings.

19 In the resolution scheme, the SRB is to determine the application of the resolution tools. Article 22(2) of Regulation No 806/2014 lists the various resolution tools available, namely the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool.

20 In the resolution scheme, the SRB may also exercise the power to write down or convert the capital instruments in the entity concerned in accordance with the conditions laid down in Article 21 of Regulation No 806/2014. Under Article 19 of Regulation No 806/2014, a resolution action may also involve the grant of State aid or use of the SRF.

21 According to Article 18(7) of Regulation No 806/2014, immediately after its adoption, the SRB is to transmit the resolution scheme to the Commission. Within 24 hours from the transmission of the resolution scheme by the SRB, the Commission must either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the resolution scheme in the cases not covered in the third subparagraph, namely compliance with the public interest criterion or a material modification of the amount of the SRF. As regards those discretionary aspects, within 12 hours from the transmission of the resolution scheme by the SRB, the Commission may propose to the Council to object to the resolution scheme adopted by the SRB on the ground that it does not fulfil the criterion of public interest or to approve or object to a material modification of the amount of the SRF provided for in the resolution scheme by the SRB. The resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the SRB.

22 Article 18(9) of Regulation No 806/2014 states that the SRB is to ensure that the necessary resolution action is taken to carry out the resolution scheme by the relevant national resolution authorities. The resolution scheme is to be addressed to those authorities and must instruct them to take all necessary measures to implement the scheme in accordance with Article 29 of that regulation by exercising resolution powers.

23 After a resolution action has been adopted, under Article 20(16) of Regulation No 806/2014, the SRB is to ensure that a valuation is carried out by an independent person in order to determine whether the shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings. Pursuant to Article 76(1)(e) of Regulation No 806/2014, that valuation may lead to the payment of compensation to shareholders or creditors if they have incurred greater losses under the resolution than they would have incurred in a winding up under normal insolvency proceedings.

Background to the dispute and events subsequent to the action being brought

24 The applicants, Mr Antonio Del Valle Ruíz and the other natural and legal persons whose names are listed in the annex, were shareholders or held bonds in Banco Popular Español, SA ('Banco Popular') before a resolution scheme was adopted in respect of Banco Popular.

The situation of Banco Popular before the resolution scheme was adopted

25 The Banco Popular group, of which Banco Popular was the parent company, was the sixth largest banking group in Spain at the time of the resolution.

26 In 2016, Banco Popular undertook a capital increase of EUR 2.5 billion.

27 On 5 December 2016, the Executive Session of the SRB adopted a resolution plan for the Banco Popular group ('the 2016 resolution plan'). The preferred resolution tool in the 2016 resolution plan was the bail-in tool provided for in Article 27 of Regulation No 806/2014.

28 On 3 February 2017, Banco Popular published its 2016 annual report in which it disclosed the need for extraordinary provisions in the sum of EUR 5.7 billion, leading to consolidated losses of EUR 3.485 billion, and the appointment of a new chairman.

29 On 10 February 2017, DBRS Ratings Limited (DBRS) (now DBRS Morningstar) downgraded Banco Popular's rating, with a negative outlook, in view of Banco Popular's weakened capital position following a net loss which was higher than that anticipated in its annual report, mentioned in paragraph 28 above, and the bank's struggle to reduce its elevated stock of non-performing assets.

30 On 3 April 2017, Banco Popular announced the results of internal audits, indicating that corrections to its 2016 annual report might be required. Those adjustments were made in Banco Popular's financial report for the first quarter of 2017.

31 At the general shareholders' meeting of Banco Popular on 10 April 2017, the Chairman of the Board of Directors announced that the bank envisaged either a further capital increase or a corporate transaction to address the group's capital position and its level of non-performing assets. The Chief Executive Officer (CEO) of Banco Popular was replaced after less than one year in his position.

32 Following the announcement of 3 April 2017 on the need to adjust the financial results of 2016, DBRS, on 6 April, downgraded Banco Popular's rating, again with a negative outlook. On 7 April, Standard & Poor's, and on 21 April 2017, Moody's Investors Service ('Moody's') also downgraded Banco Popular's rating with a negative outlook.

33 In April 2017, Banco Popular initiated a private sale process with a view to achieving its sale to a strong competitor, which would restore its financial situation. The deadline for potential purchasers interested in acquiring Banco Popular to submit their bids was initially set at 10 June 2017 and then delayed until the end of June 2017.

34 On 5 May 2017, Banco Popular presented its financial report for the first quarter of 2017, reporting losses of EUR 137 million.

35 On 12 May 2017, the liquidity coverage requirement of Banco Popular dropped below the minimum threshold of 80% set by Article 460(2)(c) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1).

36 By letter of 16 May 2017, Banco Santander, SA informed Banco Popular that it could not make a concrete bid in the context of the private sale process.

37 On 16 May 2017, in a communication of a relevant fact to the Comisión nacional del mercado de valores (CNMV) (National Securities Market Commission (CNMV), Spain), Banco Popular stated that potential purchasers had expressed an interest in the private sale process, but that it had not received any concrete bids.

38 On 19 May 2017, FITCH downgraded Banco Popular's long-term rating.

39 On 23 May 2017, the Chair of the SRB, Ms Elke König, granted an interview to the television channel Bloomberg, in which she was questioned, inter alia, on the situation of Banco Popular.

40 In May 2017, several press articles reported on the difficulties faced by Banco Popular. By way of example, it is worth mentioning an article of 11 May 2017, published on the website *elconfidencial.com*, entitled 'Saracho orders the urgent sale of Popular to JP Morgan and Lazard due to risk of insolvency' (*Saracho encarga la venta urgente del Popular a JP Morgan y Lazard por riesgo de Quiebra*). That article states that the Chairman of the bank had instructed JP Morgan and Lazard to organise the urgent sale of the bank due to a risk of insolvency, as a result of the massive outflow of deposits by private and institutional clients, and that he considered that the only way of ensuring the viability of the bank was the complete and imminent sale of the entire group. The article states that, 'in view of persistent deposit outflows and the closure of external sources of financing, the bank ran a serious risk of insolvency and that [its Chairman] was therefore forced to activate the most drastic measure and gradually refrain from selling its assets in order to improve its own fund ratios and meet the requirements of the ECB'.

41 On 15 May 2017, an article published on the website *elconfidencial.com*, entitled 'The ECB inspects Banco Popular for two months in full sales process' (*El BCE inspecciona a Banco Popular durante dos meses en pleno proceso de venta*), reported that the sales plan for Banco Popular, implemented by its chairman, took place after the ECB's inspection, which had confirmed the gap in provisions. According to that article, the ECB inspectors had concluded that Banco Popular's difficulties were associated with its stock deficit to cover its property exposure and that it was necessary to avoid occasional withdrawals of deposits. The inspectors also expressed their dissatisfaction with the presentation of the 2016 accounts.

42 On 31 May 2017, Reuters news agency published an article entitled 'EU warned of wind-down risk for Spain's Banco Popular'. That article states inter alia that, according to an EU official who remained anonymous, one of Europe's top bank watchdogs had warned EU officials that Banco Popular may need to be wound down if it failed to find a buyer. According to that article, that official also stated that the Chair of the SRB had recently issued an 'early warning' and had declared that the SRB was following the (Banco Popular) procedure with particular attention with a view to a possible intervention.

43 On the same day, the SRB published a press release disputing the content of that article.

44 In the first days of June 2017, Banco Popular had to face massive liquidity outflows.

45 On the morning of 5 June 2017, Banco Popular submitted an initial request for emergency liquidity assistance to Banco de España (Bank of Spain), then a second request, in the afternoon, containing an extension of the amount requested on account of extremely acute liquidity movements. On the basis of a request from the Bank of Spain and following the ECB's assessment on the same day as Banco Popular's request for emergency liquidity assistance, the Governing Council of the ECB did not raise any objections to urgent liquidity assistance to Banco Popular for the period up to 8 June 2017. Banco Popular received part of that emergency liquidity assistance, then the Bank of Spain stated that it was not in a position to provide additional emergency liquidity assistance to Banco Popular.

46 On 6 June 2017, DBRS and Moody's downgraded Banco Popular's rating.

Other facts prior to the adoption of the resolution scheme

47 On 23 May 2017, the SRB hired Deloitte as an independent expert to carry out a valuation of Banco Popular in accordance with Article 20 of Regulation No 806/2014.

48 On 24 May 2017, on the basis of Article 34 of Regulation No 806/2014, the SRB asked Banco Popular to supply the information required in order to carry out its valuation. On 2 June 2017, Banco Popular was also asked to supply information about the private sale process and to be ready to provide access to the secure virtual data room that it had established in the context of that process.

49 On 3 June 2017, the Executive Session of the SRB adopted Decision SRB/EES/2017/06, addressed to the Fondo de Reestructuración Ordenada Bancaria (FROB) (Fund for Orderly Bank Restructuring (FROB), Spain), concerning the marketing of Banco Popular. The SRB approved the immediate launching of the marketing of Banco Popular by the FROB and informed the latter of the requirements concerning the sale, in accordance with Article 39 of Directive 2014/59. In particular, the SRB instructed the FROB to contact the five potential purchasers which had been invited to present non-binding offers in the context of the private sale process.

50 Of the five potential purchasers, two decided not to participate in the marketing process and one was excluded by the ECB for prudential reasons.

51 On 4 June 2017, the two potential purchasers which had decided to participate in the marketing process, Banco Santander and Banco Bilbao Vizcaya Argentaria, SA (BBVA), signed a non-disclosure agreement and on 5 June 2017 were given access to the virtual data room.

52 On 5 June 2017, the SRB adopted a first valuation ('valuation 1'), pursuant to Article 20(5)(a) of Regulation No 806/2014, which had the objective of informing the determination whether the conditions for resolution, as defined in Article 18(1) of Regulation No 806/2014, were met.

53 On 6 June 2017, the ECB made a 'failing or likely to fail' assessment of Banco Popular, after consulting the SRB, in accordance with the second subparagraph of Article 18(1) of Regulation No 806/2014.

54 In that assessment, the ECB stated that over the preceding months, Banco Popular had experienced a substantial deterioration of its liquidity position, primarily driven by a significant depletion of its deposit base. Banco Popular was confronted with material cash outflows across all customer segments. The ECB listed the events which had led to the liquidity problems faced by Banco Popular.

55 In that regard, the ECB noted that, in February 2017, when presenting its annual accounts, Banco Popular had disclosed the need for extraordinary provisions in the sum of EUR 5.7 billion, leading to losses of EUR 3.485 billion for 2016, and replaced its long-standing chairman who had initiated a revision of the bank's strategy. The announcement of additional provisions and year-end losses led to Banco Popular's rating being downgraded by DBRS on 10 February 2017 and caused significant concerns on the part of Banco Popular's customer base, which were reflected by significant unexpected deposit withdrawals and a high frequency of customer visits to the bank's branches.

56 The ECB also stated that the release by Banco Popular of an ad hoc disclosure on 3 April 2017, reporting on the outcome of several internal audits with a potentially significant impact on the bank's financial statements, and the confirmation that the bank's CEO would be replaced after less than one year in office, triggered another wave of deposit outflows. The ECB noted that that wave was also fuelled by:

– a downgrade of Banco Popular's rating by Standard & Poor's on 7 April 2017;

– an announcement by Banco Popular, on 10 April 2017, that it would not pay dividends and that a capital increase or corporate transaction could be required due to its tight capital position and the necessary alignment of the non-performing assets' coverage to its peers;

– a downgrade of Banco Popular's rating by Moody's on 21 April 2017;

– the disclosure of worse-than-expected results for the first quarter of 2017;

– continuous negative media coverage such as the articles of 11 May and 15 May 2017, referred to in paragraphs 40 and 41 above, suggesting that the Chairman of Banco Popular had mandated an urgent sale of the bank due to the imminent risk of bankruptcy or illiquidity, and that the bank was facing a significant additional need for provisioning resulting from an on-site inspection by the supervisor.

57 The ECB also found that deposits lost since 31 May 2017 were particularly relevant, after disclosure in the media of the fact that the bank could face wind-down if the current sale process was not successful within a very short period.

58 In addition, the ECB noted that, while Banco Popular had developed various additional liquidity generating measures over the preceding weeks and started to implement them, the magnitude of the realised and still expected inflows was insufficient to remedy the depletion of Banco Popular's liquidity position on the date of the assessment. The ECB also stated that, even with the recourse to the emergency liquidity assistance in respect of which the Governing Council of the ECB had not raised any objections on 5 June 2017, the liquidity situation on that date did not suffice to ensure Banco Popular's ability to meet its liabilities by 7 June 2017 at the latest.

59 The ECB considered that the measures put in place by Banco Popular had not been sufficient to reverse the deterioration of its liquidity position. It stated that, as an alternative measure to ensure its capacity to meet all liabilities as they fell due, Banco Popular was trying to implement a corporate transaction, namely its sale to a stronger competitor. However, the ECB considered that, in view of the deterioration of Banco Popular's liquidity position and the lack of evidence of its capacity to turn around its liquidity situation in the near future, together with the fact that negotiations had so far not led to a positive outcome, confirmation of such a private transaction was not foreseeable in a time frame that would allow Banco Popular to be able to pay its debts or other liabilities as they fell due.

60 The ECB considered that, at the same time, there were no available supervisory or early intervention measures that could immediately restore the liquidity position of Banco Popular and allow it sufficient time to implement a corporate transaction or other solution. The measures available to the ECB as the competent authority under the national transposition of Article 104 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338), and of Articles 27 to 29 of Directive 2014/59, or of Article 16 of Regulation No 1024/2013, could not ensure that Banco Popular would be in a position to pay its debts or other liabilities as they fell due, given the extent and pace of the liquidity deterioration observed.

61 In conclusion, taking into account, in particular, the excessive deposit outflows, the speed at which liquidity had been lost from the bank and the inability of the bank to generate further liquidity, the ECB considered that there were objective elements indicating that Banco Popular was likely, in the near future, to be unable to pay its debts or other liabilities as they fell due. The ECB concluded that Banco Popular was deemed to be failing, or in any case likely to fail in the near future, in accordance with Article 18(1)(a) and (4)(c) of Regulation No 806/2014.

62 On 6 June 2017, the Board of Directors of Banco Popular informed the ECB that it had reached the conclusion that the bank was likely to fail.

63 On the same day, the FROB issued a letter containing information on the marketing process setting the deadline for the submission of bids at midnight on 6 June 2017.

64 Still on the same date, BBVA, one of the two potential buyers of Banco Popular, informed the FROB that it would not be making a bid.

65 Also on 6 June 2017, Deloitte submitted a second valuation ('valuation 2') to the SRB, drawn up pursuant to Article 20(10) of Regulation No 806/2014. The purpose of valuation 2 was to estimate the value of Banco Popular's assets and liabilities, to provide an evaluation of the treatment that shareholders and creditors would have received if Banco Popular had entered into normal insolvency proceedings, and to inform the decision to be taken on the shares and instruments of ownership to be transferred and the SRB's understanding of what constitutes commercial terms for the purposes of the sale of business tool. That valuation, inter alia, estimated the economic value of Banco Popular at EUR 1.3 billion in the best-case scenario, at minus EUR 8.2 billion in the worst-case scenario and at minus EUR 2 billion for the best estimate.

66 On 7 June 2017, Banco Santander submitted a concrete bid.

67 By letter of 7 June 2017, the FROB informed the SRB that Banco Santander had submitted a bid at 3.12 a.m. on 7 June and that the price offered by Banco Santander for the sale of Banco Popular shares was EUR 1. The FROB stated that its governing committee had selected Banco Santander as awardee of the competitive sale process of Banco Popular and had decided to propose to the SRB to designate Banco Santander as buyer in the SRB's decision on the adoption of a resolution scheme in respect of Banco Popular.

The resolution scheme for Banco Popular of 7 June 2017

68 On 7 June 2017, the Executive Session of the SRB adopted Decision SRB/EES/2017/08 concerning a resolution scheme in respect of Banco Popular ('the resolution scheme') on the basis of Regulation No 806/2014.

69 According to Article 1 of the resolution scheme, given that the conditions provided for in Article 18(1) of Regulation No 806/2014 had been met, the SRB decided to place Banco Popular under resolution as of the resolution date.

70 Accordingly, the SRB considered, first, that Banco Popular was failing or was likely to fail, second, that there were no alternative measures that could prevent the failure of Banco Popular within a reasonable time frame and, third, that resolution action in the form of a sale of business tool in respect of Banco Popular was necessary in the public interest. In that regard, the SRB stated that the resolution was a necessary and proportionate way to meet the two objectives referred to in Article 14(2) of Regulation No 806/2014, namely to achieve the continuity of the bank's critical functions and to avoid significant adverse effects on financial stability.

71 In Article 5.1 of the resolution scheme, the SRB decided the following:

'The resolution tool to be applied to [Banco Popular] shall consist in the sale of business pursuant to Article 24 of [Regulation No 806/2014] for transferring shares to a purchaser. The write-down and conversion of capital instruments will be exercised immediately before the application of the sale of business tool.'

72 Article 6 of the resolution scheme concerns the write-down of capital instruments and the sale of business tool. In Article 6.1, the SRB set out the measures which it had adopted pursuant to its write-down power provided for in Article 21 of Regulation No 806/2014.

73 Accordingly, in Article 6.1 of the resolution scheme, the SRB decided:

– first, to write down the nominal amount of Banco Popular's share capital in an amount of EUR 2 098 429 046, resulting in the cancellation of 100% of Banco Popular's share capital;

– subsequently, to convert all the principal amount of the additional Tier 1 instruments issued by Banco Popular and outstanding as at the date of the decision relating to the resolution scheme into newly issued shares of Banco Popular ('the New Shares I');

– subsequently, to write down to zero the nominal amount of the 'New Shares I', resulting in the cancellation of 100% of those 'New Shares I';

– lastly, to convert all the principal amount of the Tier 2 capital instruments issued by Banco Popular and outstanding as at the date of the resolution decision into newly issued shares of Banco Popular ('the New Shares II').

74 Article 6.3 of the resolution scheme provides that those write-down and conversion measures are based on valuation 2, as corroborated by the results of an open and transparent marketing process conducted by the Spanish resolution authority (the FROB).

75 In Article 6.5 of the resolution scheme, the SRB stated that it was exercising the powers conferred on it by Article 24(1)(a) of Regulation No 806/2014 concerning the sale of business tool, and ordered that the 'New Shares II' be transferred to Banco Santander free and clear of any rights or liens of any third party, in consideration of a purchase price of EUR 1. It was specified that the purchaser had already consented to the transfer.

76 The SRB also stated that the transfer of the 'New Shares II' should be made on the basis of the purchaser's binding offer of 7 June 2017 and implemented by the FROB under Ley 11/2015 de recuperación y resolución de entidades de crédito y empresas de servicios de inversión (Law 11/2015 on the recovery and resolution of credit institutions and investment firms) of 18 June 2015 (BOE No 146 of 19 June 2015, p. 50797).

77 The resolution scheme was submitted to the Commission for endorsement at 5.13 a.m. on 7 June 2017.

78 On 7 June 2017, at 6.30 a.m., the Commission adopted Decision (EU) 2017/1246 endorsing the resolution scheme for [Banco Popular] (OJ 2017 L 178, p. 15) and notified it to the SRB. Consequently, the resolution scheme entered into force on the same day.

79 Recital 4 of Decision 2017/1246 states the following:

'The Commission agrees with the resolution scheme. In particular, it agrees with the reasons provided by the SRB of why resolution is necessary in the public interest in accordance with Article 5 of Regulation (EU) No 806/2014.'

80 On the same day, the FROB adopted the necessary measures to implement the resolution scheme in accordance with Article 29 of Regulation No 806/2014. In that context, the FROB approved the transfer of Banco Popular's new shares resulting from the conversion of the Tier 2 instruments ('the New Shares II') to Banco Santander.

Facts subsequent to the adoption of the resolution decision

81 On 14 June 2018, Deloitte sent to the SRB the valuation of difference in treatment, provided for in Article 20(16) to (18) of Regulation No 806/2014, carried out in order to determine whether the shareholders and creditors would have received better treatment if Banco Popular had entered into normal insolvency proceedings ('valuation 3'). On 31 July 2018, Deloitte sent to the SRB an addendum to that valuation, correcting some formal errors.

82 On 28 September 2018, following a merger by acquisition, Banco Santander became the universal successor of Banco Popular.

83 On 17 March 2020, the SRB adopted decision SRB/EES/2020/52 determining whether compensation needed to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular had been effected. A communication concerning that decision was published on 20 March 2020 in the *Official Journal of the European Union* (OJ 2020 C 91, p. 2). In that decision, the SRB considered that the shareholders and creditors who were affected by the resolution of Banco Popular were not entitled to compensation from the SRF under Article 76(1)(e) of Regulation No 806/2014.

Procedure and forms of order sought

84 By application lodged at the Court Registry on 4 August 2017, the applicants brought the present action.

85 By document lodged at the Court Registry on 31 October 2017, the SRB requested the Court, pursuant to Article 92(3) of the Rules of Procedure of the General Court, to order measures of inquiry concerning the production of certain documents referred to in the annex. By decision of 6 December 2017, the Court decided not to grant that request for a measure of inquiry at that stage in the proceedings.

86 By documents lodged at the Court Registry on 6 and 21 November 2017, and on 5 and 13 December 2017, respectively, Banco Santander, the Council, the Kingdom of Spain and the European Parliament applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission and the SRB. By order of 12 April 2019, the President of the Eighth Chamber of the General Court granted Banco Santander leave to intervene and, by decision of 17 April 2019, granted the Council, the Kingdom of Spain and the Parliament leave to intervene. The Kingdom of Spain, the Parliament, the Council and Banco Santander submitted their statements in intervention, and the applicants and the SRB submitted their observations on those statements within the prescribed time limits.

87 On 13 February 2018, in the context of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the Court requested the SRB to lodge the latest, non-confidential version of the resolution scheme, as well as a non-confidential version of valuation 2 which were published on the SRB's website. The SRB lodged the documents within the prescribed time limit.

88 On 6 July 2018, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the Court put written questions to the main parties. The applicants and the SRB complied with that request within the prescribed time limit.

89 By letter lodged at the Court Registry on 9 October 2018, the applicants requested the Court to order the Commission and the SRB, by way of a measure of organisation of procedure on the basis of Article 88 of the Rules of Procedure, to produce a certain number of documents, the list of which was annexed to the request. The Commission and the SRB submitted their observations on that request within the prescribed time limit.

90 Following a change in the composition of the Chambers of the General Court, in accordance with Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Third Chamber, to which the present case was, accordingly, allocated.

91 By letter lodged at the Court Registry on 7 October 2019, the applicants produced new evidence pursuant to Article 85(3) of the Rules of Procedure. The Commission, the SRB, the Kingdom of Spain, the Parliament and the Council lodged observations on that new evidence within the prescribed time limits.

92 Acting on a proposal from the Third Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

93 On 15 March 2021, the Court, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, requested the Commission and the SRB to produce various documents. By letter of 30 March 2021, the SRB replied that the requested documents were in part confidential and that they could be produced if the Court adopted a measure of inquiry. By letter of 30 March 2021, the Commission replied that it did not have the requested document and that, therefore, it could not produce it.

94 On 15 April 2021, the Court, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, requested the SRB to produce a document. By letter of 20 April 2021, the SRB stated that the requested document was confidential and that it could be produced if the Court adopted a measure of inquiry.

95 By order of 21 May 2021, the Court ordered the SRB, on the basis, first, of the first paragraph of Article 24 of the Statute of the Court of Justice of the European Union and, second, of Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, to produce the full versions of the resolution scheme, valuation 2, the ECB's assessment of 6 June 2017 that Banco Popular was failing or was likely to fail, Banco Popular's letter of 6 June 2017 to the ECB, including the annex to that letter, and the ECB's letter of 18 May 2017 to Banco Popular. The Court also ordered the SRB to produce non-confidential versions of Banco Popular's letter of 6 June 2017 to the ECB, including the annex to that letter, and of the ECB's letter of 18 May 2017 to Banco Popular.

96 By order of 16 June 2021, the Court removed from the file the confidential versions of the documents produced by the SRB pursuant to the order of 21 May 2021, and sent to the applicants, the Commission, the Kingdom of Spain, the Parliament, the Council and Banco Santander the letter of 6 June 2017 from Banco Popular to the ECB without the annex to that letter.

97 Since two members of the Third Chamber, Extended Composition were unable to sit, the President of the General Court designated two other Judges to complete the Chamber.

98 The parties presented oral argument and answered oral questions put to them by the Court at the hearing on 21 June 2021.

99 The applicants claim that the Court should:

– annul the resolution scheme and Decision 2017/1246 (together, 'the contested decisions');

– order the SRB and the Commission to pay the costs.

100 The SRB and the Commission contend that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

101 Banco Santander, the Kingdom of Spain and the Council contend that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

102 The Parliament contends that the Court should:

– dismiss the action in so far as it is based on the pleas of illegality raised against Regulation No 806/2014;

– order the applicants to pay the costs.

Law

103 In support of their action, the applicants raise nine pleas in law. The first plea alleges that Article 18 of Regulation No 806/2014 is unlawful in so far as it infringes the right to be heard and the right to an effective remedy enshrined in Articles 41 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and the principle of proportionality. The second plea alleges infringement of Articles 41 and 47 of the Charter. The third plea alleges infringement of the right to property. The fourth plea alleges infringement of Article 20 of Regulation No 806/2014. The fifth plea alleges infringement of Article 18(1)(a) and (b) of Regulation No 806/2014. The sixth plea alleges infringement of Article 21(1) of Regulation No 806/2014. The seventh plea alleges infringement of the obligation to state reasons. The eighth plea alleges infringement of the principle of proportionality and of the principle of the protection of legitimate expectations. The ninth plea alleges that Articles 18 and 22 of Regulation No 806/2014 are unlawful in so far as they infringe the principles relating to the delegation of powers.

104 As a preliminary point, it must be noted that, as regards the scope of the review carried out by the Court, the applicants rely on the judgment of 18 July 2013, *Commission and Others* v *Kadi* (C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518), in order to argue that the Court must carry out a full review and, in particular, determine whether the facts alleged are made out in the light of the relevant information or evidence and assess the probative value of that information or evidence in the circumstances of the particular case and in the light of any observations submitted by the person concerned. That requirement is reinforced where, as in the present case, the applicants have not been heard during the resolution procedure.

105 The SRB submits that the scope of the judicial review carried out by the Court is that established by the case-law applicable to a legal act based on provisions which confer discretionary power on the authority concerned and relate to economic and highly technical issues.

106 In that regard, it must be noted that the case-law has defined the scope of the review carried out by the Court both in situations in which the contested act is based on an assessment of highly complex scientific and technical facts and where there are complex economic assessments.

107 First, with regard to situations in which the EU authorities have a broad discretion, in particular as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which they adopt, review by the EU Courts is limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. In such a context, the EU judicature cannot substitute its assessment of scientific and technical facts for that of the EU authorities on which alone the FEU Treaty has placed that task (judgments of 21 July 2011, *Etimine*, C-15/10, EU:C:2011:504, paragraph 60, and of 7 March 2013, *Bilbaína de Alquitranes and Others* v *ECHA*, T-93/10, EU:T:2013:106, paragraph 76; see, also, judgment of 11 May 2017, *Deza* v *ECHA*, T-115/15, EU:T:2017:329, paragraph 163 and the case-law cited).

108 Second, as regards the review by the EU Courts of the complex economic assessments made by the EU authorities, that review is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. When conducting such a review, the EU Courts must also not substitute their own economic assessment for that of the competent EU authority (see, to that effect, judgments of 11 July 1985, *Remia and Others* v *Commission*, 42/84, EU:C:1985:327, paragraph 34; of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 100 and the case-law cited; and of 16 January 2020, *Iberpotash* v *Commission*, T-257/18, EU:T:2020:1, paragraph 96 and the case-law cited).

109 Since the decisions which the SRB is required to adopt in the context of a resolution procedure are based on highly complex economic and technical assessments, it must be held that the principles resulting from the case-law referred to in paragraphs 107 and 108 above apply to the review which the Court is called upon to carry out.

110 However, although the SRB has discretion with regard to economic and technical matters, that does not mean that the EU Courts must refrain from reviewing the SRB's interpretation of information of an economic nature which forms the basis of its decision. As the Court of Justice has held, even in the case of complex assessments, the EU judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of supporting the conclusions drawn from it (see judgments of 22 November 2007, *Spain* v *Lenzing*, C-525/04 P, EU:C:2007:698, paragraph 57 and the case-law cited; of 26 March 2019, *Commission* v *Italy*, C-621/16 P, EU:C:2019:251, paragraph 104 and the case-law cited, and of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 115 and the case-law cited).

111 In that regard, in order to establish that the SRB committed a manifest error in assessing facts so as to justify the annulment of the resolution scheme, the evidence adduced by the applicants must be sufficient to render the factual assessments adopted in that scheme implausible (see, by analogy, judgments of 14 June 2018, *Lubrizol France* v *Council*, C-223/17 P, not published, EU:C:2018:442, paragraph 39; of 12 December 1996, *AIUFFASS and AKT* v *Commission*, T-380/94, EU:T:1996:195, paragraph 59; and of 13 December 2018, *Comune di Milano* v *Commission*, T-167/13, EU:T:2018:940, paragraph 108 and the case-law cited).

112 The Court considers it appropriate to examine, first of all, the pleas of illegality raised in the first and ninth pleas in law, then the fourth, fifth and sixth pleas in law and, lastly, the second, third, seventh and eighth pleas in law.

The first plea in law, alleging that Article 18 of Regulation No 806/2014 infringes the right to be heard and the right to an effective remedy enshrined in Articles 41 and 47 of the Charter and infringes the principle of proportionality

113 On the basis of Article 277 TFEU, the applicants claim that Article 18 of Regulation No 806/2014 is unlawful. This plea is divided into three parts, alleging that the procedure laid down in that article infringes, first, the right to be heard enshrined in Article 41(2)(a) of the Charter, second, the right to an effective remedy enshrined in Article 47 of the Charter and, third, the principle of proportionality.

114 According to settled case-law, Article 277 TFEU gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article 263 TFEU to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (see judgment of 17 December 2020, *BP* v *FRA*, C-601/19 P, not published, EU:C:2020:1048, paragraph 26 and the case-law cited).

115 Since the purpose of Article 277 TFEU is not to allow a party to contest the applicability of any act of general application in support of any action whatsoever, the act the legality of which is called in question must be applicable, directly or indirectly, to the issue with which the action is concerned (see judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 68 and the case-law cited).

116 Thus, in an action for annulment brought against individual decisions, the Court of Justice has accepted that the provisions of an act of general application that constitute the basis of those decisions or that have a direct legal connection with such decisions may legitimately form the subject matter of a plea of illegality. By contrast, the Court of Justice has held that a plea of illegality covering an act of general application in respect of which the individual decision being challenged does not constitute an implementing measure is inadmissible (see judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraphs 69 and 70 and the case-law cited).

The first part, alleging that Article 18 of Regulation No 806/2014 infringes the right to be heard

117 The applicants submit that the resolution procedure laid down in Article 18 of Regulation No 806/2014 does not comply with the right to be heard enshrined in Article 41(2)(a) of the Charter, in that it does not provide for the possibility, for the shareholders and creditors of the entity whose rights have been affected to make their views known before the resolution scheme is adopted.

118 The SRB and the Parliament submit that, if the shareholders of an institution subject to a resolution procedure have a right to be heard enshrined in Article 41(2)(a) of the Charter, that right is recognised even in the absence of any express provision in Regulation No 806/2014. The absence of an express provision in Article 18 of Regulation No 806/2014 providing for a hearing of shareholders does not render that regulation unlawful, since there is no provision prohibiting such a hearing.

119 It must be noted that Article 41(2)(a) of the Charter provides that the right to good administration includes, inter alia, the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.

120 The right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely. In addition, it should be stated that the right to be heard pursues a dual objective. First, to enable the case to be examined and the facts to be established in as precise and correct a manner as possible, and, secondly, to ensure that the person concerned is in fact protected. The right to be heard is intended, inter alia, to guarantee that any decision adversely affecting a person is adopted in full knowledge of the facts, and its purpose is to enable the competent authority to correct an error or to enable the person concerned to submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content (see judgment of 4 June 2020, *EEAS* v *De Loecker*, C-187/19 P, EU:C:2020:444, paragraphs 68 and 69 and the case-law cited).

121 It should be noted that the Court of Justice has affirmed the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person. In accordance with the case-law of the Court of Justice, observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement (see judgments of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraphs 85 and 86 and the case-law cited; of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 67 and the case-law cited; and of 7 November 2019, *ADDE* v *Parliament*, T-48/17, EU:T:2019:780, paragraph 89 and the case-law cited).

122 Therefore, in the light of its character as a fundamental general principle of EU law, the application of the principle of the rights of the defence, which include the right to be heard, cannot be excluded or restricted by any legislative provision. Respect for that principle must therefore be ensured both where there is no specific legislation and also where legislation exists which does not itself take account of that principle (see judgment of 18 June 2014, *Spain* v *Commission*, T-260/11, EU:T:2014:555, paragraph 62 and the case-law cited).

123 The scope of the right to be heard, as a principle and fundamental right of the EU legal order, is afforded when the administration plans to adopt a measure adversely affecting a person, that is, a measure which may have a negative effect on the interests of the individual or Member State concerned, since its application does not depend on the existence of an express rule to that effect laid down by subordinate legislation (judgment of 18 June 2014, *Spain* v *Commission*, T-260/11, EU:T:2014:555, paragraph 64).

124 In that regard, it should be noted, first, that, according to recital 121 of Regulation No 806/2014, that regulation respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, including the right of defence, and should be implemented in accordance with those rights and principles. Second, no provision of Regulation No 806/2014 expressly excludes or restricts the right of the shareholders and creditors of the entity concerned to be heard during the resolution procedure.

125 Thus, contrary to what the applicants submit, the absence of a specific provision in Article 18 of Regulation No 806/2014 providing for a hearing of the shareholders of the entity which is the subject of a resolution action before the adoption of a decision cannot be interpreted as an absolute denial of the right to be heard in all circumstances, undermining the essence of that right. The applicants are wrong in arguing that Article 18 of Regulation No 806/2014 excludes the right to be heard in all cases, and not only where there is urgency.

126 In addition, it should be noted, as the Commission, the Council and the Parliament have submitted, that a resolution action adopted by the SRB following the procedure laid down in Article 18 of Regulation No 806/2014 concerns the resolution of an entity. The entity subject to resolution must be regarded as the person in respect of whom an individual measure is adopted and to whom the right to be heard is guaranteed by Article 41(2)(a) of the Charter.

127 Thus, account should be taken of the fact that the shareholders and creditors of that entity are not addressees of a resolution action, which is not an individual decision taken against them.

128 However, it must be noted that, according to Article 21(1) of Regulation No 806/2014, the SRB may exercise the power to write down or convert the capital instruments of the entity covered by a resolution action by acting under the procedure laid down in Article 18 of that regulation.

129 Thus, even if the procedure laid down in Article 18 of the regulation does not constitute an individual procedure initiated against the shareholders and creditors of the entity concerned, it may lead to the adoption of a resolution action liable to affect their interests adversely.

130 The case-law of the Court of Justice cited in paragraph 121 above adopted a broad interpretation of the right to be heard as being guaranteed to every person during proceedings which are liable to culminate in a measure adversely affecting that person. Therefore, it cannot be ruled out that the shareholders of an institution which is the subject of a resolution action may rely on the right to be heard in a resolution procedure.

131 However, the exercise of the right to be heard may be subject to limitations in accordance with Article 52(1) of the Charter, according to which:

‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

132 It is therefore necessary to examine whether the absence, in Regulation No 806/2014, of a provision expressly providing for a hearing of the shareholders and creditors of the entity concerned in the context of the procedure referred to in Article 18 of that regulation constitutes a limitation on the exercise of the right to be heard that complies with Article 52(1) of the Charter.

133 The Court of Justice has held that fundamental rights, such as observance of the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see judgments of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 33 and the case-law cited, and of 20 December 2017, *Prequ'Italia*, C-276/16, EU:C:2017:1010, paragraph 50 and the case-law cited).

134 In that regard, the SRB, the Kingdom of Spain, the Parliament and the Council submit that the limitation of the right of shareholders to be heard is justified, first, by the objective of ensuring the stability of the financial markets and, second, by the need to ensure the effectiveness of resolution decisions, which must be adopted quickly.

135 In the first place, it must be noted that several recitals of Regulation No 806/2014, in particular recitals 12, 58 and 61, state that the stability of financial markets is one of the objectives pursued by the resolution mechanisms established by that regulation.

136 Furthermore, in accordance with Article 18(5) of Regulation No 806/2014, a resolution action is to be treated as in the public interest if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 of that regulation, and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent. The resolution objectives referred to in Article 14 of Regulation No 806/2014 include, inter alia, the objective of '[avoiding] significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline', and that of '[protecting] public funds by minimising reliance on extraordinary public financial support'.

137 In that regard, the Court of Justice has stated that financial services play a central role in the economy of the European Union. Banks and credit institutions are an essential source of funding for businesses that are active in the various markets. In addition, the banks are often interconnected and a number of them operate internationally. That is why the failure of one or more banks is liable to spread rapidly to other banks, either in the Member State concerned or in other Member States. That is likely, in turn, to produce negative spill-over effects in other sectors of the economy (judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 50; of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 72; and of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 108).

138 The Court of Justice has held that the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition constitutes an overriding public interest (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 69).

139 In addition, the European Court of Human Rights ('the ECtHR') held, in its decision of 1 April 2004, *Camberrow MM5 AD v. Bulgaria* (CE:ECHR:2004:0401DEC005035799, § 6), that, in delicate economic areas such as the stability of the banking system, the States enjoyed a wider margin of appreciation and that, therefore, the impossibility for a shareholder to participate in the proceedings leading to the sale of the bank was not disproportionate to the legitimate aims of protecting the rights of creditors and safeguarding the proper administration of the bank's bankruptcy estate.

140 Reference should also be made to the judgment of 8 November 2016, *Dowling and Others* (C-41/15, EU:C:2016:836), delivered in response to a request for a preliminary ruling concerning the interpretation of Articles 8, 25 and 29 of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of [the second paragraph of Article 54 TFEU], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such

safeguards equivalent (OJ 1977 L 26, p. 1). That case concerned an exceptional measure by the national authorities aimed at preventing, by means of an increase in capital, the failure of a company which, according to the referring court, threatened the financial stability of the European Union. The Court of Justice held that the protection conferred by Second Directive 77/91 on the shareholders and creditors of a public limited liability company, with respect to its share capital, did not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a Member State and that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned (judgment of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 50). The Court of Justice added that the provisions of Second Directive 77/91 did not therefore preclude an exceptional measure affecting the share capital of a public limited liability company taken by the national authorities where there was a serious disturbance of the economy and financial system of a Member State, without the approval of the general meeting of that company, with the objective of preventing a systemic risk and ensuring the financial stability of the European Union (see judgment of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 51 and the case-law cited).

141 Those considerations apply, by analogy, to the situation of former shareholders of a bank which has been placed under resolution pursuant to Regulation No 806/2014.

142 Furthermore, it should be noted that another objective of the resolution, referred to in Article 14(2)(a) of Regulation No 806/2014, namely to ensure the continuity of the critical functions of the entity concerned by a resolution action, also contributes to the public interest objective of protecting the stability of the financial markets.

143 Under Article 2(1)(35) of Directive 2014/59, the critical functions of an institution are defined as 'activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations'.

144 In that regard, Article 6(1) of Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59 with regard to the circumstances and conditions under which the payment of extraordinary *ex post* contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines (OJ 2016 L 131, p. 41), lays down the criteria for determining critical functions. It is a function provided by an institution to third parties who are not affiliated to the institution or group, the sudden disruption of which would likely have a material negative impact on those third parties, would give rise to contagion or would undermine the general confidence of market participants due to the systemic relevance of the function for third parties and the systemic relevance of the institution or group in providing that function.

145 Thus, the objective of ensuring the continuity of the critical functions of the entity concerned by a resolution action, provided for in Article 14(2)(a) of Regulation No 806/2014, is intended to prevent a break in those functions which could lead to disruption, not only on the market concerned, but also for the overall financial stability of the European Union.

146 Accordingly, since resolution action is intended to preserve or restore the financial situation of a credit institution, in particular in so far as it constitutes an alternative to its liquidation, it must be regarded as effectively meeting an objective of general interest recognised by the European Union (see, by analogy, judgment of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 108).

147 It follows from the foregoing that the resolution procedure established by Regulation No 806/2014 and described in Article 18 of that regulation pursues an objective of general interest, within the meaning of Article 52(1) of the Charter, namely the objective of ensuring the stability of the financial markets, capable of justifying a limitation on the right to be heard.

148 In the second place, a number of recitals in Regulation No 806/2014 imply that, when a resolution action becomes necessary, it must be adopted quickly. Those are, inter alia, recitals 26, 31 and 53, and especially recital 56 of that regulation which states that, in order to minimise disruption to the financial market and to the economy, the resolution process should be accomplished in a short time.

149 In that regard, the Court of Justice has held that the objective of Regulation No 806/2014 is to establish, in accordance with recital 8, more efficient resolution mechanisms, which must be an essential instrument to avoid damage that has resulted from failures of banks in the past and that that objective presupposes a speedy decision-making process, as the short time limits laid down in Article 18 of that regulation illustrate, so that financial stability is not jeopardised (judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 55).

150 Thus, Article 18(1) of Regulation No 806/2014 states, inter alia, that, where the ECB considers that an entity is failing or is likely to fail, it is to communicate that assessment without delay to the Commission and the SRB. According to paragraph 2 of that article, where the SRB itself carries out an assessment, it is to be communicated to the ECB without delay. If the conditions laid down in paragraph 1 are met, the SRB must adopt a resolution scheme which, pursuant to Article 18(7) of Regulation No 806/2014, is to be transmitted to the Commission immediately after its adoption. The Commission then has 24 hours in which to endorse a resolution scheme or raise objections.

151 It follows that once the entity satisfies the conditions for the adoption of a resolution action, that is to say, first, that it is failing or is likely to fail, second, that there is no reasonable prospect that any alternative private sector measures or supervisory action would prevent its failure within a reasonable time frame and, third, that its resolution is necessary to achieve one or more of the objectives referred to in Article 14 of Regulation No 806/2014, Article 18 of that regulation provides that a decision must be adopted within a very short time frame.

152 That rapid decision is aimed, in particular, at ensuring the continuity of the critical functions of the entity concerned and at avoiding the effects of the entity's failure on financial stability. Speed in taking a decision is therefore a condition for its effectiveness.

153 Thus, the Court of Justice has already ruled that the urgency requiring immediate action by the competent authority justified a limitation of the right to be heard of the persons concerned by measures adopted in the field of environmental liability (see, to that effect, judgment of

9 March 2010, *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 67) and in the field of agriculture (see, to that effect, judgment of 15 June 2006, *Dokter and Others*, C-28/05, EU:C:2006:408, paragraph 76).

154 Moreover, in the field of fund-freezing measures, the Court of Justice has held that the communication of the grounds on which the initial inclusion of the name of a person or entity in the list of persons subject to restrictive measures is based, prior to that inclusion, would be liable to jeopardise the effectiveness of the freezing of funds and economic resources imposed by EU law. In order to attain the objective pursued by the applicable regulation, such measures must, by their very nature, take advantage of a surprise effect and apply with immediate effect (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 338 to 340; of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 61; and of 12 February 2020, *Amisi Kumba* v *Council*, T-163/18, EU:T:2020:57, paragraph 51).

155 Nor are the EU authorities bound to hear the applicants before their names are included for the first time in the list of persons subject to restrictive measures, for reasons also connected to the objective pursued by EU law and to the effectiveness of the measures provided by that law (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 341, and of 25 April 2013, *Gbagbo* v *Council*, T-119/11, not published, EU:T:2013:216, paragraph 103).

156 That is all the more true in cases where the restriction on the right to be heard concerns not the entity covered by the resolution procedure, but its shareholders or creditors.

157 It should also be noted that, in its decision of 1 April 2004, *Camberrow MM5 AD* v. *Bulgaria* (CE:ECHR:2004:0401DEC005035799), the ECtHR found that the sale of the bankrupt bank as a going concern had been effected in order to achieve the prompt and more certain satisfaction of its creditors, who had been waiting for years to receive their dues, and the quick completion of the bankruptcy proceedings. Therefore, the need for simplicity and speed in the procedure leading to the sale of the bank was of paramount importance. If the law provided that the bankruptcy court was under an obligation to consult with all shareholders and creditors of the bank, that would have led to a substantial slowing down of the proceedings and, consequently, to a further delay in the payment of the creditors' dues and in the completion of the bankruptcy proceedings.

158 In the judgment of 24 November 2005, *Capital Bank AD* v. *Bulgaria* (CE:ECHR:2005:1124JUD004942999, §136), the ECtHR held that, in such a sensitive economic area as the stability of the banking system and in certain situations, there may be a paramount need to act expeditiously and without advance notice in order to avoid irreparable harm to the bank, its depositors and other creditors, or the banking and financial system as a whole.

159 Furthermore, the fact that the resolution action may lead to an interference with the right to property of the shareholders and creditors of the entity concerned cannot justify an obligation to grant them a right to be heard before it is adopted.

160 In that regard, the General Court has already highlighted in paragraph 282 of the judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others* (T-680/13, EU:T:2018:486) that the applicable provisions must offer the person concerned a reasonable

opportunity of putting his or her case to the competent authorities. In order to ensure compliance with that requirement, which constitutes a requirement inherent in Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), a comprehensive view must be taken of the applicable procedures (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 368 and the case-law cited; of 25 April 2013, *Gbagbo* v *Council*, T-119/11, not published, EU:T:2013:216, paragraph 119; and ECtHR, 20 July 2004, *Bäck v. Finland*, EC:ECHR:2004:0720JUD003759897, § 56). Therefore, that requirement cannot be interpreted as meaning that the interested person must, in all circumstances, be able to make his or her views known to the competent authorities prior to the adoption of measures infringing his or her right to property (see, to that effect, ECtHR, 19 September 2006, *Maupas and Others v. France*, EC:ECHR:2006:0919JUD001384402, §§ 20 and 21).

161 The General Court considered that that was the case, in particular where, as with a resolution action, the measures at issue did not constitute a penalty and were implemented in a context of particular urgency. On that last point, the General Court noted that it concerned prevention of an imminent risk of collapse of the banks concerned in order to protect the stability of the financial system of a Member State and, therefore, to prevent contagion to other Member States of the euro area. The establishment of a prior consultation procedure, in the context of which the thousands of depositors and shareholders of the banks concerned could have usefully made their views known prior to the adoption of the harmful provisions, would inevitably have delayed the application of measures seeking to prevent such a collapse. The achievement of the objective consisting in protecting the stability of the financial system of that Member State and, therefore, preventing contagion to other Member States of the euro area would have been exposed to serious risks (see judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 282 and the case-law cited).

162 That assessment was confirmed by the Court of Justice which held that the General Court had correctly based its reasoning on the judgment of the ECtHR of 21 July 2016, *Mamatas and Others v. Greece* (CE:ECHR:2016:0721JUD006306614), from which it is clear that the requirement that any restriction on the right to property must be provided for by law cannot be interpreted as meaning that the persons concerned should have been consulted before the adoption of that law, in particular where such prior consultation would inevitably have delayed the application of the measures designed to prevent the collapse of the banks concerned (judgment of 16 December 2020, *Council and Others* v *K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 159).

163 Furthermore, it must be concluded that the need to act swiftly without informing the shareholders and creditors of an entity that a resolution procedure concerning that entity is imminent is intended to avoid the worsening of that entity's situation which would undermine the effectiveness of the resolution action. Informing the shareholders or bondholders of the bank that it might be under resolution, and therefore that it was considered to be failing or likely to fail, could encourage them to sell their securities on the markets and also lead to a massive withdrawal of deposits, which would have the effect of exacerbating the bank's financial situation and making it more difficult, or even impossible, to adopt a solution likely to prevent its liquidation.

164 In that respect, as is apparent from recital 116 of Regulation No 806/2014, any information provided in respect of a decision before it is taken, be it on whether the conditions for resolution are satisfied, on the use of a specific tool or on any action during the proceedings, must be presumed to have effects on the public and private interests concerned by the action.

165 It must therefore be held that the establishment, in Regulation No 806/2014, of a consultation of the shareholders and creditors of the entity concerned before the adoption of a resolution action would result in a substantial slowdown in the procedure and would compromise both the attainment of the objectives of the action and its effectiveness.

166 Furthermore, the SRB submits that rumours concerning financial institutions or financial markets can have far-reaching consequences and that it must therefore ensure the confidentiality of the procedure. Since hearing individuals potentially affected by the resolution action would entail the disclosure of information on the actions to be taken, it is foreseeable that this would have adverse effects on financial stability due to the systemic importance of that information.

167 The applicants' assertion that the second objective of general interest relied on by the SRB is the protection of confidentiality is based on a misunderstanding of the SRB's argument. By that argument, the SRB asserts that the confidentiality of the procedure is a necessary means of protecting the public interest consisting in ensuring the stability of the financial system.

168 In addition, the applicants claim that any concern regarding disclosure could be allayed by rigorous rules on confidentiality.

169 That argument is based on a misunderstanding of the objective pursued by the protection of the confidentiality of the procedure. Information which should not be disclosed, in particular to shareholders, concerns the implementation of the resolution procedure. It is a question of taking account of the risk that the shareholders, when informed of that procedure before a decision is adopted, might be encouraged to sell their shareholdings, which would have the effect of worsening the entity's situation and of giving rise to a risk of insolvency and, in the case of banks of systemic importance, of leading to a risk of contagion on the market as a whole.

170 Furthermore, as the Commission submits, since the identity of the entity's shareholders is unknown, the resolution authority would have to make a public call for them to submit their views, which would entail a risk of a bank run. As the Council also states, given that shares and bonds are traded continuously on the markets, it is impossible, in practice, to know which individual and institutional investors must be contacted.

171 Therefore, confidentiality commitments made by the shareholders, even if the latter were identifiable, could not remedy the risk to financial stability posed by the dissemination of information that an entity is under a resolution procedure.

172 At the hearing, the applicants submitted that hearing the shareholders during the preparatory stage of the resolution action, before the entity was considered to be failing or likely to fail, is conceivable, given that that stage is not constrained by urgency.

173 It must be noted that the resolution procedure provided for in Article 18 of Regulation No 806/2014 begins once the conditions laid down have been met and that the resolution planning stages do not fall within that procedure. Accordingly, the applicants' argument cannot call into question the legality of the procedure laid down in Article 18 of Regulation

No 806/2014. In any event, the considerations referred to in paragraphs 169 and 170 above preclude the consultation of the shareholders of the entity concerned not only once the procedure laid down in Article 18 of Regulation No 806/2014 has been initiated, but also during the preparatory stage of the resolution action.

174 It follows from all of the foregoing that hearing the shareholders and creditors of the entity which is the subject of a resolution action, before the adoption of that action, would undermine the objectives of the stability of the financial markets and the continuity of the entity's critical functions, and the requirements of speed and effectiveness of the resolution procedure.

175 Therefore, the absence of any provision requiring the shareholders and creditors of the entity concerned to be heard in the context of the procedure laid down in Article 18 of Regulation No 806/2014 constitutes a limitation on the right to be heard which is justified and necessary in order to meet an objective of general interest and respects the principle of proportionality, in accordance with Article 52(1) of the Charter.

176 That conclusion is not called into question by the applicants' other arguments.

177 First, the applicants rely on Commission Staff Working Document SWD/2012/166 final of 6 June 2012, entitled 'Impact Assessment accompanying the document - Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010' ('the impact assessment'), in which the Commission recognised that shareholders are entitled 'to have their grievance against the restructuring measures heard'.

178 In that regard, it is sufficient to note, as the SRB states, that the extract from the impact assessment cited by the applicants relates expressly to the right to a fair trial and the right to an effective remedy, enshrined in Articles 6 and 13 ECHR. That extract therefore relates to the right of shareholders to an effective remedy against a measure already adopted, but it cannot be interpreted as referring to a right to be heard prior to the adoption of a resolution decision.

179 Secondly, the applicants rely on the judgment of the ECtHR of 24 November 2005, *Capital Bank AD v. Bulgaria* (CE:ECHR:2005:1124JUD004942999). They submit that, in that case, a national authority had withdrawn banking authorisation from a bank without informing it beforehand and without giving it the possibility of bringing proceedings. The ECtHR concluded that, having regard to the prominent place held in a democratic society by the right to a fair trial, the Bulgarian court's decision to abide by the Bulgarian National Bank's determination without subjecting it to any criticism or discussion, coupled with the absence of any means of scrutinising that determination in direct review proceedings, was not justified.

180 As the applicants themselves submit, the fundamental element of the judgment of the ECtHR of 24 November 2005, *Capital Bank AD v. Bulgaria* (CE:ECHR:2005:1124JUD004942999), and of the judgment of the ECtHR of 19 June 2008, *Ismeta Bačić v. Croatia* (CE:ECHR:2008:0619JUD004359506), is the assertion that Article 6(1) ECHR applies to insolvency proceedings.

181 Thus, as the Commission and the SRB submit, the judgment of the ECtHR of 24 November 2005, *Capital Bank AD v. Bulgaria* (CE:ECHR:2005:1124JUD004942999), concerned an infringement of the right to a fair trial enshrined in Article 6(1) ECHR in the absence of any legal remedy provided for in Bulgarian law against a decision of the National Bank of Bulgaria revoking a bank's licence and related only to the procedural rights of the financial institution concerned and not to the rights of shareholders and creditors. That judgment did not concern the right to be heard prior to the adoption of a decision and is therefore irrelevant.

182 Thirdly, the applicants also rely on the legislation of certain Member States which give creditors and shareholders the opportunity to submit observations during insolvency proceedings.

183 It is sufficient to note, as the SRB submits, that national insolvency proceedings are not comparable to a resolution procedure under Regulation No 806/2014. In the context of insolvency proceedings at national level, the creditors are heard once insolvency proceedings have been initiated. Thus, as the SRB submits, with the opening of insolvency proceedings, the harm to shareholders and creditors has already occurred and the disclosure of the insolvency cannot aggravate that harm. By contrast, as regards the resolution procedure, disclosure of information to the creditors of the entity concerned regarding a potential resolution may have serious negative effects.

184 In addition, as the SRB argues, in the decision of the ECtHR of 1 April 2004, *Camberrow MM5 AD v. Bulgaria* (CE:ECHR:2004:0401DEC005035799), the ECtHR held that an obligation to consult with shareholders and creditors in insolvency proceedings would result in a delay in the proceedings and that the fact that it was impossible for the majority shareholder to participate in the proceedings was not disproportionate in the light of the legitimate objectives of protecting the rights of creditors of the bank and of safeguarding the proper administration of the bank's bankruptcy estate.

185 It follows from all of the foregoing that the plea of illegality in respect of Article 18 of Regulation No 806/2014, in so far as the procedure which it establishes infringes the right to be heard by failing to provide for a hearing of the shareholders and creditors of the entity concerned, must be rejected.

186 Accordingly, the first part of the plea must be rejected.

The second part, alleging that Article 18 of Regulation No 806/2014 infringes the right to an effective remedy

187 The applicants submit that the procedure provided for in Article 18 of Regulation No 806/2014 fails to respect the right to an effective judicial remedy in so far as there is no judicial oversight of that procedure. The fact that there is a right to bring an action for annulment before the Court cannot remedy the infringement of the right to an effective remedy, in so far as the Court does not have jurisdiction to order the relevant institution to take steps to reverse the acts implementing the resolution.

188 The applicants claim, in essence, that Article 18 of Regulation No 806/2014 infringes the right to an effective remedy in that it does not provide for the intervention of a court before the adoption of the resolution decision.

189 It should be noted that Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, requires, in its first paragraph, that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law (see judgment of 6 October 2020, *Bank Refah Kargaran* v *Council*, C-134/19 P, EU:C:2020:793, paragraph 36 and the case-law cited).

190 It is sufficient to note that the applicants' argument is based on a misinterpretation of the scope of the right to an effective remedy enshrined in Article 47 of the Charter. Article 47 of the Charter guarantees a right to an effective remedy against an act which adversely affects a person and not before the adoption of the act.

191 Following the adoption of a resolution action, the right to an effective remedy is guaranteed by the possibility of bringing an action for annulment under Article 263 TFEU against decisions adopted by the SRB, in accordance with Article 86 of Regulation No 806/2014, and against Commission decisions, and by the possibility of bringing an action for damages.

192 In an action for annulment brought against a resolution action, the Court is able to examine whether the procedure followed by the SRB complied with the requirements laid down in Article 18 of Regulation No 806/2014. The applicants cannot therefore validly maintain that the procedure laid down in Article 18 of Regulation No 806/2014 is not subject to any judicial review.

193 Furthermore, the applicants submit that the fact that there is a right to bring an action for annulment before the Court cannot remedy an infringement of the right to an effective remedy, since the Court has no jurisdiction to order the relevant institution to take measures to reverse the acts implementing the resolution.

194 It should be noted that Article 47 of the Charter is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union, as is apparent also from the Explanation on Article 47, which must, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, be taken into consideration for the interpretation of the Charter (see judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97 and the case-law cited, and of 25 February 2021, *VodafoneZiggo Group* v *Commission*, C-689/19 P, EU:C:2021:142, paragraph 136 and the case-law cited).

195 It is sufficient to note that, although the EU Courts do not have the power to issue directions to the SRB, the latter is under an obligation, pursuant to Article 86(4) of Regulation No 806/2014 and Article 266 TFEU, to take the necessary measures to comply with a judgment of the Court of Justice of the European Union.

196 It must therefore be held that the fact that Article 18 of Regulation No 806/2014 does not provide for intervention by the courts during the procedure leading to the adoption of a resolution decision does not constitute an infringement of Article 47 of the Charter.

197 Lastly, the applicants are wrong to rely on the case-law on restrictive measures, according to which compliance with the obligation to communicate the reasons for a decision is necessary to enable the persons to whom such measures are addressed to defend their rights in the best possible conditions and to respect the right to effective judicial protection.

198 Unlike restrictive measures whereby an individual economic and financial sanction (freezing of funds) is imposed on a person, a resolution scheme is not an individual measure taken against the shareholders of the entity concerned. Therefore, the case-law cited by the applicants according to which the person subject to a restrictive measure, as the addressee of such a decision, must be informed of the reasons for that decision is not applicable in the present case.

199 It follows that the plea of illegality in respect of Article 18 of Regulation No 806/2014, in so far as it infringes the right to an effective judicial remedy, must be rejected and, therefore, the second part of this plea in law must be rejected.

The third part, alleging that Article 18 of Regulation No 806/2014 infringes the principle of proportionality

200 The applicants claim that, in so far as, for the reasons set out in the first two parts of this plea, the resolution procedure provided for in Article 18 of Regulation No 806/2014 does not respect the right to be heard and the right to an effective judicial remedy, that procedure does not comply with the principle of proportionality in that it goes beyond what is necessary to achieve the objectives set out in recital 122 of Regulation No 806/2014, namely '[to set] up an efficient and effective single European framework for the resolution of entities and [to ensure] the consistent application of resolution rules'.

201 It is sufficient to note, first, that it has been concluded, in the first part, that the fact that the shareholders and creditors of the entity concerned were not heard in the resolution procedure was justified by an objective of general interest and was necessary, in compliance with the principle of proportionality, in accordance with Article 52(1) of the Charter. Second, it is apparent from the analysis of the second part of the plea that the applicants have not established that the procedure laid down in Article 18 of Regulation No 806/2014 infringed the right to an effective remedy.

202 Therefore, since the first two parts have been rejected, the third part must also be rejected.

203 It follows from all of the foregoing that the plea of illegality in respect of Article 18 of Regulation No 806/2014, raised in the first plea in law, must be rejected as unfounded.

The ninth plea in law, alleging that Articles 18 and 22 of Regulation No 806/2014 are unlawful in that they infringe the principles relating to the delegation of power

204 On the basis of Article 277 TFEU, the applicants claim that Articles 18 and 22 of Regulation No 806/2014 are unlawful, on the ground that those articles infringe the principles relating to the delegation of power set out in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

205 The applicants submit that the SRB's decision on whether the conditions set out in Article 18 of Regulation No 806/2014 are met entails a broad discretion. The SRB makes complex economic assessments and, in so doing, participates in the implementation of an actual economic policy. The SRB has a broad discretion to decide on the resolution tool to be adopted pursuant to Article 18(6) and Article 22 of Regulation No 806/2014. They submit that the provisions of Article 18(7) of Regulation No 806/2014, according to which the Commission is to endorse the resolution scheme within 24 hours, constitute a circumvention of the principles laid down in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7). Given the time limit set, it is the SRB which decides on the resolution policy, with the Commission simply carrying out a 'rubber-stamp' function.

206 The Commission, the SRB, the Council and the Parliament submit, in essence, that the procedure established by Regulation No 806/2014 is consistent with the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7). The EU legislature has not delegated discretionary powers to the SRB, since the SRB's resolution scheme produces binding legal effects only if it is endorsed by the Commission or the Council. Since the power to decide on matters involving discretionary assessments is reserved to the Commission or to the Council, those institutions thus assume legal and political responsibility for determining the European Union's resolution policy.

207 It should be noted that the Treaties do not contain any provision providing for the conferral of powers on an EU body, office or agency. Thus, no mention is made of agencies in either Article 290 TFEU, which provides for delegation of rule-making in legislative acts to the Commission, or Article 291 TFEU which confers implementing powers on the Member States, the Commission, and in some limited circumstances the Council (Opinion of Advocate General Jääskinen in *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2013:562, point 75).

208 It is therefore the case-law, and in particular the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), which laid down the principles governing the delegation of powers. Next, the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18), applied those principles to cases where autonomous powers have been conferred on an agency by the EU legislature.

209 In paragraph 41 of the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18), the Court of Justice stated that, in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), the Court of Justice had emphasised, in essence, that the consequences resulting from a delegation of powers were very different depending on whether it involved clearly defined executive powers the exercise of which could, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involved a 'discretionary power implying a wide margin of discretion which [could], according to the use which [was] made of it, make possible the execution of actual economic policy'.

210 The Court of Justice added that it had also stated in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7) that a delegation of the first kind could not appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaced the choices of the delegator by the choices of the delegate, brought about an 'actual transfer of responsibility' (judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 42).

211 As a preliminary point, it must be noted that the procedure for adopting resolution actions established by the legislature in Regulation No 806/2014 followed the observations made by the Council Legal Service in an opinion of 7 October 2013 on the Commission's proposal for a regulation, which sought to assess the compatibility of the procedure initially laid down in the proposal for a regulation with the principles governing the delegation of powers, as interpreted in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

212 Originally, in the proposal for a regulation examined in that opinion, the division of powers between the Commission and the SRB differed from that ultimately adopted in Regulation No 806/2014. In particular, the Commission had the power to place an entity under resolution, to establish a framework for the use of resolution tools and to decide whether and how the powers to write down or convert capital instruments were to be used, and the SRB, in accordance with the framework established by the Commission, was competent to adopt decisions addressed to the national resolution authorities.

213 In its opinion, the Council Legal Service stated that certain measures which the SRB could include in a resolution decision were not defined with sufficient precision. The Council Legal Service considered that the general economy and structure of the proposal for a regulation, whereby the Commission would be endowed with the power to adopt the basic resolution decisions and the SRB would be held to act within the criteria laid down by the Commission itself, is in conformity with EU law as interpreted in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7). However, it considered that the powers of the SRB to implement resolution tools and decisions seem at certain instances to be of a rather discretionary nature, thus going beyond the exercise of purely technical powers. Therefore, it concluded that it would be necessary either to include in the regulation further specifications in order properly to frame the application by the SRB of resolution tools or to involve in the exercise of those powers an EU institution vested with executive competences.

214 The EU legislature, taking that opinion from the Council Legal Service into consideration, amended the mechanism for adopting resolution actions. Given that the adoption of a resolution action involves a margin of discretion, the legislature reserved that power to an institution and not to the SRB.

215 That is apparent, in particular, from recitals 24 and 26 of Regulation No 806/2014 which state:

> '(24) Since only institutions of the Union may establish the resolution policy of the Union and since a margin of discretion remains in the adoption of each specific resolution scheme, it is necessary to provide for the adequate involvement of the Council and the Commission, as institutions which may exercise implementing powers, in accordance with Article 291 TFEU. The assessment of the discretionary aspects of the resolution decisions taken by the [SRB] should be exercised by the Commission. Given the considerable impact of the resolution decisions on the financial stability of Member States and on the Union as such, as well as on the fiscal sovereignty of Member States, it is important that implementing power to take certain decisions relating to resolution be conferred on the Council. It should therefore be for the Council, on a proposal from the Commission, to exercise effective control on the assessment by the [SRB] of the existence of a public interest and to assess any material change to the amount of the [SRF] to be used in a specific resolution action. …

(26) … The [SRB], if it considers all the criteria relating to the triggering of resolutions to be met, should adopt the resolution scheme. The procedure relating to the adoption of the resolution scheme, which involves the Commission and the Council, strengthens the necessary operational independence of the [SRB] while respecting the principle of delegation of powers to agencies as interpreted by the Court of Justice of the European Union … . Therefore, this Regulation provides that the resolution scheme adopted by the [SRB] enters into force only if, within 24 hours after its adoption by the [SRB], there are no objections from the Council or the Commission or the resolution scheme is approved by the Commission. The grounds on which the Council is permitted to object, on a proposal by the Commission, to the [SRB's] resolution scheme should be strictly limited to the existence of a public interest and to material modifications by the Commission of the amount of the use of the [SRF] as proposed by the [SRB]. … As an observer to the meetings of the [SRB], the Commission should, on an ongoing basis, check that the resolution scheme adopted by the [SRB] complies fully with this Regulation, balances appropriately the different objectives and interests at stake, respects the public interest and that the integrity of the internal market is preserved. Considering that the resolution action requires a very speedy decision-making process, the Council and the Commission should cooperate closely and the Council should not duplicate the preparatory work already undertaken by the Commission …'

216 Contrary to what is claimed by the applicants, Regulation No 806/2014, in particular recital 26 of that regulation, does not recognise that the conferral of powers on the SRB poses problems with regard to the delegation of powers. On the contrary, in view of the fact that the decision to subject an entity to a resolution action adopted on the basis of Regulation No 806/2014 entails the exercise of a discretionary power involving a choice of economic policy, the legislature provided for a specific adoption mechanism in Article 18(7) of that regulation.

217 Thus, as regards the resolution procedure, Article 18(7) of Regulation No 806/2014 provides that the Commission is either to endorse the resolution scheme or object to it with regard to the discretionary aspects of the scheme and that a resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the SRB.

218 Therefore, under Article 18(7) of Regulation No 806/2014, it is necessary for an EU institution, namely the Commission or the Council, to endorse the resolution scheme with regard to its discretionary aspects in order for the scheme to produce legal effects. The EU legislature thus conferred on an institution the legal and political responsibility for determining the European Union's resolution policy, thereby avoiding an 'actual transfer of responsibility' within the meaning of the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

219 As the Commission, the Parliament and the Council submit, the EU legislature, by establishing the procedure for the adoption of a resolution action provided for in Regulation No 806/2014 and by expressly reserving the decision on the discretionary aspects of such an action to the EU institutions, did not delegate autonomous power to the SRB.

220 In the light of those considerations, it is necessary to examine the applicants' arguments relating to the powers conferred on the SRB by Articles 18 and 22 of Regulation No 806/2014.

221 First, the applicants submit that the condition laid down in Article 18(1)(c) of Regulation No 806/2014, according to which a resolution action must be necessary in the public interest, confers a broad discretion on the SRB, given that that condition requires the SRB to arbitrate conflicts between various public interests and to undertake complex economic assessments and given that, in doing so, the SRB participates in the implementation of an actual economic policy.

222 In that regard, it should be noted that the third subparagraph of Article 18(7) of Regulation No 806/2014 expressly provides that the Commission may object to the resolution scheme if it does not fulfil the criterion of public interest.

223 Compliance with the condition laid down in Article 18(1)(c) of Regulation No 806/2014 is a prerequisite for the decision to place an institution under a resolution procedure, and the review of the need for the action in the light of the public interest entails the exercise of a discretionary power involving a broad discretion. For that reason, the EU legislature expressly conferred on the Commission, and where necessary on the Council, the power to monitor compliance with that condition.

224 Secondly, the applicants submit that, under Article 18(6) and Article 22 of Regulation No 806/2014, the SRB has broad discretion to decide which resolution tool to adopt. The SRB is guided by the objectives set out in Article 14 of Regulation No 806/2014, which encompass subjective criteria.

225 It must be noted that, under the third subparagraph of Article 18(7) of Regulation No 806/2014, the Commission is to assess whether the resolution scheme satisfies the public interest criterion laid down in paragraph 1(c) of that article. In that regard, Article 18(5) of Regulation No 806/2014 states that, 'for the purposes of point (c) of paragraph 1 of this Article, a resolution action shall be treated as in the public interest if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent'.

226 It should also be noted that Article 14(1) of Regulation No 806/2014 states:

'When acting under the resolution procedure referred to in Article 18, the [SRB], the Council, the Commission, and, where relevant, the national resolution authorities, in respect of their respective responsibilities, shall take into account the resolution objectives, and choose the resolution tools and resolution powers which, in their view, best achieve the resolution objectives that are relevant in the circumstances of the case.'

227 Thus, the objectives referred to in Article 14 of Regulation No 806/2014 are not imposed solely on the SRB, but also on the Commission, when it has to endorse the choice of resolution tool. It also follows that it is for the Commission, when assessing compliance with the public interest criterion, to assess whether the choice of the resolution tool is appropriate and proportionate to the objectives of the resolution.

228 Accordingly, the SRB does not have autonomous power to decide to make an entity subject to a resolution action under Article 18 of Regulation No 806/2014, or to decide on the resolution tool that should be applied pursuant to Article 22 of that regulation. Contrary to what is claimed by the applicants, those provisions do not lead to a delegation of discretionary powers to the SRB.

229 The applicants also submit that the provisions of Article 18(7) of Regulation No 806/2014, according to which the Commission is to endorse the resolution scheme within 24 hours, constitute a circumvention of the principles laid down in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7). Given the time limit set, it is the SRB which decides on the resolution policy, and the Commission merely 'rubber-stamps' it.

230 It should be noted that, according to Article 30 of Regulation No 806/2014, the SRB is to inform the Commission of any action it takes in order to prepare for resolution, that the SRB, the Council and the Commission are to cooperate closely, in particular in the resolution planning, early intervention and resolution phases, and that they are to provide each other with all information necessary for the performance of their tasks. In addition, Article 43(3) of Regulation No 806/2014 provides that the Commission is to designate a representative entitled to participate in the meetings of executive sessions and plenary sessions of the SRB as a permanent observer, and that its representative is entitled to participate in the debates and have access to all documents.

231 It is apparent from those provisions that the Commission is informed and associated with the preparatory phases leading to the adoption of a resolution action. Contrary to what the applicants submit, the Commission does not become aware of the resolution scheme only once it has been adopted by the SRB, but has sufficient time, during the preparation of the scheme, to assess its discretionary aspects.

232 The applicants cannot therefore claim that the fact that the Commission has only 24 hours to endorse the resolution scheme leads it merely to validate the scheme. Since the Commission's status as an observer enables it to follow the work during the various phases preceding the adoption of the resolution scheme, its endorsement of the resolution scheme is not merely a formality.

233 Moreover, the circumstances which led to the adoption of the Commission decision in the present case and which are referred to by the applicants are not relevant for the purposes of assessing the legality of the contested provisions of Regulation No 806/2014.

234 Accordingly, it follows from all of the foregoing that the plea of illegality in respect of Articles 18 and 22 of Regulation No 806/2014, raised in the ninth plea in law, must be rejected as unfounded.

235 Furthermore, it should be noted that, in the reply, the applicants add arguments seeking a declaration, in the alternative, that, even if Regulation No 806/2014 were consistent with the principles relating to the delegation of power set out in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), that principle was not observed in the present case. They submit, in essence, that the Commission did not adopt Decision 2017/1246 in full knowledge of the facts concerning the discretionary aspects of the resolution scheme and that, in the absence of a lawful endorsement, the resolution scheme is based on an error of law or on a manifest error of assessment.

236 The Commission and the SRB submit that, by those arguments raised for the first time in the reply, the applicants raise a new plea which is inadmissible.

237 At the hearing, the applicants confirmed that that argument constituted a new plea.

238 Under Article 84(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

239 In order to justify the introduction of those new arguments at the stage of the reply, the applicants submit that it is apparent from documents produced 'since the date' that the Commission simply 'rubber-stamped' the resolution scheme without discussion. The applicants rely on the circumstances of the present case, namely the fact that the resolution scheme was transmitted to the Commission on 7 June 2017 at 5.13 a.m. and that the Commission endorsed it at 6.30 a.m. on the same day, that is to say, 77 minutes later. They maintain that it follows that the Commission could not have carried out the assessment required by Article 18(7) of Regulation No 806/2014.

240 In that regard, it should be noted, first of all, that the applicants do not mention what those new documents are and do not specify the date from which they were produced. Furthermore, it must be stated, as the Commission has done, that the factual circumstances relied on were known to the applicants from when the action was brought and that those circumstances are referred to in the application. Thus, first, as regards the transmission of the resolution scheme to the Commission at 5.13 a.m. on 7 June 2017, the applicants refer to the Commission decision annexed to the application. Second, as regards the fact that the resolution scheme entered into force at 6.30 a.m. on the same day, it is sufficient to note that that piece of information was stated in the version of the resolution scheme annexed to the application.

241 It follows that that new plea is not based on matters of law or of fact which came to light in the course of the procedure and that plea must therefore be rejected as inadmissible pursuant to Article 84(1) of the Rules of Procedure.

242 In any event, as is apparent from paragraphs 230 to 232 above, the Commission, in accordance with its obligations under Regulation No 806/2014 and by virtue of its status as an observer, was involved in the preparatory phases for the adoption of the resolution scheme. The applicants cannot therefore claim that the Commission's intervention was limited to the interval between the SRB's transmission of the resolution scheme on 7 June 2017 at 5.13 a.m. and its endorsement.

The fourth plea in law, alleging infringement of Article 20 of Regulation No 806/2014

243 The applicants submit that the SRB and the Commission infringed Article 20 of Regulation No 806/2014 by failing to ensure that a 'fair, prudent and realistic' independent provisional valuation was undertaken in advance of the contested decisions and by failing to ensure that an *ex post* definitive valuation was carried out. They rely on the versions of valuation 1 and valuation 2 published by the SRB on its website on 31 October 2018.

244 Article 20(1) of Regulation No 806/2014 provides:

'Before deciding on resolution action or the exercise of the power to write down or convert relevant capital instruments, the [SRB] shall ensure that a fair, prudent and realistic valuation of the assets and liabilities of an entity referred to in Article 2 is carried out by a person independent from any public authority, including the [SRB] and the national resolution authority, and from the entity concerned.'

245 This plea is divided, in essence, into three complaints, relating to valuation 1, valuation 2 and the absence of an *ex post* definitive valuation.

246 As a preliminary point, it should be noted that the valuation of Banco Popular, carried out before the adoption of the resolution scheme, comprises two reports which are annexed to the resolution scheme.

247 Valuation 1, dated 5 June 2017, was prepared by the SRB under Article 20(5)(a) of Regulation No 806/2014 and had the objective of informing the determination of whether the conditions for resolution, as defined in Article 18(1) of Regulation No 806/2014, were met.

248 Valuation 2, dated 6 June 2017, was drawn up by Deloitte as an independent expert, in accordance with Article 20(10) of Regulation No 806/2014.

249 The resolution scheme states that, given the urgency, valuation 2 was carried out, in accordance with Article 20(10) of Regulation No 806/2014, with the purpose of assessing the value of the assets and liabilities of Banco Popular, providing an evaluation of the treatment that the shareholders and creditors would have received if Banco Popular had entered into normal insolvency proceedings and informing the decision to be taken on the shares or instruments of ownership to be transferred and the SRB's understanding of what constitutes commercial terms for the purposes of the sale of business tool.

250 In valuation 2, Deloitte stated that it had relied on the requirements of Article 36 of Directive 2014/59 (corresponding to Article 20 of Regulation No 806/2014) and on Chapter 3 of the final draft of the Regulatory Technical Standards of the European Banking Authority (EBA) No 2017/05 and No 2017/06 of 23 May 2017 on valuation for the purposes of resolution and on valuation to determine difference in treatment following resolution under Directive 2014/59 ('the technical standards of the EBA').

251 Article 36(15) of Directive 2014/59 authorises the EBA to develop draft regulatory technical standards to specify the criteria on the basis of which valuations carried out during a resolution procedure must be conducted.

252 Chapter 3 of the technical standards of the EBA relates to draft Regulatory Technical Standards No 2017/05 on valuation for the purposes of resolution ('the regulatory technical standards') and contains, inter alia, in accordance with Article 36(15) of Directive 2014/59, a draft Commission Delegated Regulation supplementing Directive 2014/59 with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities.

253 In addition, it must be noted that, at the date of the adoption of the resolution scheme, the regulatory technical standards were not binding, since the second subparagraph of Article 5(2) of Regulation No 806/2014 provides that the SRB, the Council and the Commission are to be subject to the binding regulatory technical and implementing standards drawn up by the EBA when they have been adopted by the Commission. Those regulatory technical standards were incorporated into Commission Delegated Regulation (EU) 2018/345 of 14 November 2017 supplementing Directive 2014/59 with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities (OJ 2018 L 67, p. 8).

254 In Article 6.3 of the resolution scheme, the SRB stated that, in order to decide on the write-down and conversion of Banco Popular's capital instruments, it had relied on valuation 2, as supplemented and corroborated by the results of the marketing process conducted by the FROB.

255 Since valuation 2 contains complex technical and economic assessments, it was necessary for the SRB to be allowed a broad discretion when it considered that valuation 2 constituted a valid basis for deciding on resolution actions.

256 Consequently, in accordance with the case-law cited in paragraphs 106 to 111 above, the review carried out by the Court is a limited review which is confined to verifying that there was no manifest error of assessment by the SRB when it considered that valuation 2 complied with the requirements of Article 20 of Regulation No 806/2014. It is for the applicants to adduce sufficient evidence to render valuation 2 implausible.

The first complaint, relating to valuation 1

257 The applicants claim that valuation 1 was not carried out by an independent person, as required by Article 20(1) of Regulation No 806/2014. Even though Article 20(3) of Regulation No 806/2014 provides that that valuation may be carried out by the SRB, it is permitted only where an independent valuation is not possible. As Deloitte was commissioned to prepare valuation 2 on 23 May 2017, it could therefore have carried out valuation 1. The SRB has not demonstrated that there was sufficient urgency to justify the provisional nature of valuation 1.

258 As a preliminary point, the Commission contends that that complaint is inadmissible in so far as it constitutes a new plea, raised for the first time in the reply, even though it is based on information that was available when the action was brought. The fact that the SRB itself carried out valuation 1 is apparent from the resolution scheme set out in the annex to the application.

259 It is true that, under Article 84 of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which come to light in the course of the procedure.

260 However, a plea in law which constitutes an amplification of a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, must be declared to be admissible. Moreover, arguments which in substance have a close connection with a plea raised in the application initiating the proceedings cannot be considered new pleas, and they may be raised at the stage of the reply or the hearing (see judgments of 22 March 2018, *Stavytskyi* v *Council*, T-242/16, not published, EU:T:2018:166, paragraph 123 and the case-law cited, and of 8 November 2018, "*Pro NGO*!" v *Commission*, T-454/17, EU:T:2018:755, paragraph 70 and the case-law cited). To be regarded as an amplification of a plea or a head of claim previously advanced, a new line of argumentation must, in relation to the pleas or heads of claim initially set out in the application, present a sufficiently close connection with the pleas or heads of claim initially put forward in order to be considered as forming part of the normal evolution of debate in proceedings before the Court (see judgment of 8 July 2020, *VQ* v *ECB*, T-203/18, EU:T:2020:313, paragraph 56 and the case-law cited).

261 In the application, the applicants submitted, admittedly briefly, that the SRB and the Commission had not carried out an independent valuation. Accordingly, that complaint is closely connected with the plea raised in the application and is not a new plea in law.

262 However, as the SRB rightly submits, the applicants' arguments seeking to call into question the validity of valuation 1 must be regarded as ineffective.

263 Valuation 1, which was aimed at determining, in accordance with the regulatory technical standards, whether Banco Popular was failing or likely to fail, in order to establish whether the conditions for initiating a resolution procedure or for the write-down or conversion of capital instruments had been met, became obsolete following the assessment carried out by the ECB on 6 June 2017 that Banco Popular was failing or likely to fail.

264 In valuation 1, the SRB stated that the reference date for its assessment was 31 March 2017. It should be noted that the ECB relied on the significant withdrawals of deposits from Banco Popular from April and May 2017 and on its inability to generate further liquidity, in order to conclude that, on 6 June 2017, Banco Popular was failing or likely to fail. Thus, the conclusions in valuation 1 were no longer relevant on the date of the resolution.

265 It follows that the applicants' arguments seeking to criticise the SRB for having carried out valuation 1 itself, and the arguments raised in the reply seeking to claim, in the alternative, that valuation 1 does not contain a 'fair, prudent and realistic' valuation of the value of Banco Popular's assets and liabilities prior to resolution, must be rejected as ineffective.

266 In any event, as the applicants themselves submit, in accordance with Article 20(3) of Regulation No 806/2014, read in conjunction with paragraph 10 of that article, where an independent valuation in accordance with paragraph 1 is not possible due to urgency, the SRB may carry out a provisional valuation of an entity's assets and liabilities.

267 It must be noted that, contrary to what is claimed by the applicants, the SRB justified, in valuation 1, the reasons why that valuation was to be carried out as a matter of urgency. It stated, inter alia, that, due to the rapid deterioration in Banco Popular's liquidity ratios, as a result of significant withdrawals of deposits over the previous days, it had decided, in consultation with the ECB, to carry out a provisional emergency valuation on the basis of available public and monitoring information.

268 It is sufficient to note that the applicants have not put forward any argument to call into question those findings.

269 Accordingly, the first complaint must be rejected as ineffective.

The second complaint, relating to valuation 2

270 In the first place, the applicants submit that the purpose of valuation 2 should have been to guide the SRB as regards the choice of resolution action to be adopted. However, the SRB had already chosen the appropriate resolution action and therefore instructed Deloitte to produce a report leading to that conclusion. The fundamental flaw of valuation 2 was that it was based on the assumption that a resolution action was required and that the SRB would use the sale of business tool. Valuation 2 does not comply with Article 20(5)(b) of Regulation No 806/2014 or with the regulatory technical standards. Deloitte did not take into account the 2016 resolution plan and it did not consider any resolution action other than the sale of business tool. That disregards the requirement to present separate valuations reflecting a diverse range of resolution actions.

271 As a preliminary point, it must be noted that, under Article 20 of Regulation No 806/2014, a provisional valuation is to be carried out for the purposes of the resolution. Accordingly, the applicants cannot validly argue that the fact that valuation 2 is based on the assumption that a resolution action is necessary constitutes a fundamental flaw in valuation 2.

272 The applicants claim, in essence, that Deloitte, in valuation 2, did not propose any resolution action other than the sale of business tool, which is contrary to Article 20(5)(b) of Regulation No 806/2014 and the regulatory technical standards.

273 It must be noted that Deloitte stated that, after a consultation with the SRB, valuation 2 would be carried out taking into account the fact that the sale of business tool would be applied.

274 It should be noted that, as the Commission and the SRB submitted, the decision on the choice of the resolution tool to be applied is taken by the resolution authority and not by the independent valuer. In that regard, the SRB explained, in Article 5.3 of the resolution scheme, why the application of the other resolution tools provided for in Article 22 of Regulation No 806/2014 would not meet the objectives of the resolution to the same extent.

275 Article 20(5)(b) of Regulation No 806/2014, which provides that, if the conditions for resolution are met, the purpose of the valuation is to inform the decision on the appropriate resolution action to be taken in respect of an entity, must be interpreted as meaning that the valuation must provide the SRB with the technical and economic information necessary to implement the resolution tool chosen by the SRB.

276 It does not follow from that provision that it is for the valuer to determine himself or herself which resolution tool is to be applied.

277 First, Article 20(5) of Regulation No 806/2014 defines the objectives of the valuation depending on the resolution tool applied. In particular, Article 20(5)(f) of Regulation No 806/2014 defines the objectives of the valuation where the sale of business tool is applied; those objectives differ from the objectives referred to in Article 20(5)(d) and (e) of that regulation, relating to cases where either the bail-in tool, the bridge institution tool or the asset separation tool is applied.

278 It follows that Article 20(5) of Regulation No 806/2014 expressly envisages a situation where a valuation is carried out with a view to the application of a given resolution tool.

279 Second, as regards the method which must be used in the valuation, recital 6 of the regulatory technical standards provides that the choice of the most appropriate measurement basis (the hold value or the disposal value) should be made for the particular resolution actions being considered by the resolution authority. Article 11(4) of the regulatory technical standards, reproduced in Article 11(4) of Delegated Regulation 2018/345, sets out the measurement method which must be used by the valuer based on the resolution tool being considered.

280 The applicants rely on an extract from the technical standards of the EBA, in the introductory section entitled ‘Background and rationale’, according to which ‘the criteria in the [regulatory technical standards] aim to guide separate valuations capturing the impact on expected cash flows resulting from a sufficiently diverse range of actions that may be adopted by the resolution authority, including, but not limited to, any resolution strategy described in the entity’s resolution plan.’

281 That extract cannot be interpreted as meaning that, in each case, the valuation must envisage several situations involving resolution actions. It merely states that the objective of the technical regulatory standards is to set out the elements and factors which must be taken into account by the valuer in the valuation according to the resolution actions envisaged by the authority.

282 In that regard, it follows from Article 10(1) of the regulatory technical standards, reproduced in Article 10(1) of Delegated Regulation 2018/345, that the valuer is to assess the impact on the valuation of each resolution action that the resolution authority may adopt to inform the decisions and that, without prejudice to the valuer's independence, the resolution authority may consult with the valuer in order to identify the range of resolution actions being considered by that authority. According to Article 10(2) of the regulatory technical standards, reproduced in Article 10(2) of Delegated Regulation 2018/345, the valuer is to present separate valuations that reflect the impact of a sufficiently diverse range of resolution actions only where appropriate and in consultation with the resolution authority.

283 Thus, under the regulatory technical standards, Deloitte was able to take the view, after consulting the SRB, that valuation 2 could be carried out by taking into account the resolution tool being considered by the SRB, namely the sale of business tool.

284 Accordingly, the applicants cannot claim that valuation 2 should have taken account of the application of resolution tools other than that being considered by the SRB.

285 Furthermore, the fact that the SRB took the view that the sale of business tool was best able to fulfil the objectives of the resolution and that the SRB commissioned Deloitte to carry out a valuation meeting the objectives of that tool cannot be regarded as undermining Deloitte's independence.

286 As regards the applicants' argument that Deloitte failed to take into account the 2016 resolution plan, it is sufficient to note that, in recitals 44 to 46 of the resolution scheme, the SRB set out the reasons why the solution envisaged in the 2016 resolution plan was not applicable to Banco Popular's situation on the date of the resolution. The SRB stated that that plan worked on the assumption that the failure of Banco Popular would be based on a deterioration in its capital situation and that, given that the failure would be as a result of a deterioration in Banco Popular's liquidity position, the bail-in tool considered in the 2016 resolution plan would not enable that situation to be re-established and thus restore Banco Popular's financial soundness and long-term viability.

287 Since valuation 2 was carried out based on the sale of business tool, it was therefore not necessary to take into account the 2016 resolution plan, which was based on the application of another resolution tool.

288 It follows from the foregoing that the SRB did not make a manifest error of assessment in finding that valuation 2 complied with Article 20(5)(b) of Regulation No 806/2014 and with the regulatory technical standards.

289 In the second place, the applicants submit that, in any event, even if valuation 2 could limit its assessment to a single resolution tool, it would not be 'fair, prudent and realistic' within the meaning of Article 20(1) of Regulation No 806/2014. Valuation 2 contains numerous caveats concerning the time and information available.

290 In that regard, it must be noted that, in the letter accompanying the communication of valuation 2 to the SRB, Deloitte stated that, given Banco Popular's difficult liquidity position, it had been asked to carry out its valuation within an extremely short period. The main work was limited to 12 days from the day on which it had access to the documentation, whereas normally such a project would take six weeks. Deloitte stated that there were a number of gaps and

inconsistencies in the available information. Deloitte mentioned that the valuation had to be regarded as highly uncertain and provisional under Article 36 of Directive 2014/59 and that a buffer for additional losses had been included in the valuation in accordance with Article 36(9) of Directive 2014/59, which corresponds to Article 20(10) of Regulation No 806/2014.

291 The applicants maintain that it is not apparent from the evidence that there was a sufficient urgency to justify carrying out a provisional valuation under Article 20(10) of Regulation No 806/2014.

292 In that regard, it is sufficient to note that the urgency is justified, in the resolution scheme, in particular by the rapid deterioration of Banco Popular's liquidity position. The applicants have not put forward any arguments to challenge those assessments by the SRB.

293 Contrary to what is claimed by the applicants, the fact that the SRB contacted Deloitte on 23 May 2017 to carry out valuation 2 does not mean that the latter had sufficient time to carry out a definitive valuation of Banco Popular. It must be noted that, since the ECB declared, on 6 June 2017, that Banco Popular was failing or likely to fail, Deloitte had only 12 days to carry out valuation 2. First, Banco Popular's size and significance should be taken into account. As the SRB states, Banco Popular had a total balance sheet of EUR 130 billion and held a large quantity of assets that were difficult to value, such as non-performing assets, tax assets or intangible assets. Secondly, certain information was not available within the required time limits.

294 Article 20(10) of Regulation No 806/2014 expressly provides for the situation in which, in view of the urgency of the situation, it is not possible to comply with the requirements laid down in paragraphs 7 and 9 of that article, namely, in particular, where it is not possible to supplement the valuation with certain information contained in the accounting books and records. In addition, that provision recognises the existence of uncertainties inherent in any provisional valuation by providing, in its second subparagraph, that it includes a buffer for additional losses.

295 Furthermore, it is apparent from Article 20(13) of Regulation No 806/2014 that, in view of the urgency of the situation, the SRB could rely on valuation 2, carried out under Article 20(10) of Regulation No 806/2014, in order to adopt the resolution scheme.

296 Thus, in accordance with Article 20(10) of Regulation No 806/2014, Deloitte merely indicated that, given the limited time available to carry out the valuation, it had had to rely on incomplete information and stated that the valuation which it had carried out had to be regarded as a provisional valuation under Article 36(9) of Directive 2014/59.

297 Therefore, the fact that Deloitte stated that, in view of the time available, certain information was incomplete is not sufficient to call into question the possibility of relying on valuation 2 in order to adopt the resolution scheme.

298 Moreover, the uncertainties inherent in valuation 2 are highlighted in the regulatory technical standards from which it is apparent that, when assessing and updating the cash flows which the entity can expect from existing assets and liabilities, the valuer must rely on fair, prudent and realistic assumptions and take various factors and circumstances into account.

299 In particular, as regards estimates concerning the disposal value, Article 12(5) of the regulatory technical standards, reproduced in Article 12(5) of Delegated Regulation 2018/345, provides:

'The disposal value shall be determined by the valuer on the basis of the cash flows, net of disposal costs and net of the expected value of any guarantees given, that the entity can reasonably expect in the currently prevailing market conditions through an orderly sale or transfer of assets or liabilities. Where appropriate, having regard to the actions to be taken under the resolution scheme, the valuer may determine the disposal value by applying a reduction for a potential accelerated sale discount to the observable market price of that sale or transfer. To determine the disposal value of assets which do not have a liquid market, the valuer shall consider observable prices on markets where similar assets are traded or model calculations using observable market parameters, with discounts for illiquidity reflected as appropriate.'

300 Article 12(6) of the regulatory technical standards, reproduced in Article 12(6) of Delegated Regulation 2018/345, sets out various factors which the valuer is to take into account and which may affect the disposal values and disposal periods.

301 It follows that valuation 2 was based on assumptions and depended on multiple factors. Thus, in accordance with the regulatory technical standards, in order to determine Banco Popular's disposal value at the date of resolution, Deloitte, in valuation 2, relied on prospective estimates and assessments and presented its result in the form of a range of values.

302 Accordingly, it must be concluded that, given the time constraints and the information available, some uncertainties and approximations are inherent in any provisional valuation carried out under Article 20(10) of Regulation No 806/2014 and that the reservations expressed by Deloitte cannot mean that valuation 2 was not 'fair, prudent and realistic' within the meaning of Article 20(1) of Regulation No 806/2014.

303 In the third place, the applicants submit that the breadth of the range of valuations between the worst-case and best-case scenarios contained in valuation 2 should have alerted the SRB to the fact that that valuation was unreliable. As at 31 March 2017, Banco Popular's net assets stood at EUR 10.78 billion, which was difficult to reconcile with that range of valuations.

304 In that regard, it must be noted that, in valuation 2, Deloitte stated that the outcome of its assessment was in a range of between EUR 1.3 billion and minus EUR 8.2 billion, with the best estimate within that range being minus EUR 2 billion.

305 First, it should be noted that the applicants merely dispute the reliability of that range without putting forward specific arguments seeking to challenge the method of calculating that range or to establish what errors were made in the assessment of each category of assets.

306 The comparison made by the applicants with the situation of Banco Popular's net assets as at 31 March 2017 is irrelevant, since it corresponds to Banco Popular's book value on a date prior to the resolution. Thus, first, that value does not take account of the fact that Banco Popular's situation had significantly deteriorated after that date. Second, it reflects Banco Popular's book value and not its disposal value, the latter corresponding to Banco Popular's economic value for a potential purchaser, which was to be assessed in valuation 2.

307 Secondly, it should be noted that the breadth of the range is justified by the method used in valuation 2.

308 In that respect, with regard to the methodology used in valuation 2, Deloitte stated that it had adopted a category-by-category approach, adjusting the book values of each class of assets and liabilities in order to estimate profits and losses, and other adjustments that any purchaser would apply to the value. It produced a valuation range for each class of assets and liabilities.

309 That method complies with Article 2(3) of the regulatory technical standards, reproduced in Article 2(3) of Delegated Regulation 2018/345, according to which:

'The valuer shall provide the best point estimate of the value of a given asset, liability, or combinations thereof. Where appropriate, the results of the valuation shall also be provided in the form of value ranges.'

310 Thus, the addition of the lowest values for each class of assets and liabilities provided the low estimate of the range and the addition of the highest values provided the high estimate of the range. That method therefore explains the breadth of the range used in valuation 2.

311 Moreover, as the SRB submits, given the size of Banco Popular's total balance sheet, with a total figure exceeding EUR 130 billion, the difference between the two values in the range represented only approximately 7% of the balance sheet. That difference thus reflects the degree of uncertainty inherent in the valuation process.

312 It follows from the foregoing that the SRB did not make a manifest error of assessment in finding that valuation 2 was 'fair, prudent and realistic', in accordance with Article 20(10) of Regulation No 806/2014.

313 The second complaint must therefore be rejected.

The third complaint, relating to the absence of an ex post *definitive valuation*

314 The applicants complain that the SRB did not carry out an *ex post* definitive valuation 'as soon as practicable', in breach of Article 20(11) of Regulation No 806/2014, as there was no independent valuation 1, valuations 1 and 2 were provisional, they are unreliable and it is expressly stated that they would be followed by *ex post* definitive valuations. The applicants state that it was when the SRB replied to a question put by the Court in the present proceedings that the applicants were informed that no *ex post* definitive valuation would be carried out.

315 On 30 July 2018, in response to the questions put by the Court in the context of a measure of organisation of procedure, the SRB stated that valuation 2 would not be followed by an *ex post* definitive valuation. The SRB took the view that, because of the particular features of the present case, it had come to the conclusion that an *ex post* definitive valuation would serve no practical purpose in the context of Article 20(11) of Regulation No 806/2014, nor would it lead to a compensatory decision provided for in Article 20(12) of that regulation.

316 It must be noted that the *ex post* definitive valuation provided for in Article 20(11) of Regulation No 806/2014 is, by definition, subsequent to the adoption of the resolution scheme and the Commission decision.

317 Furthermore, as stated in paragraph 295 above, under Article 20(13) of Regulation No 806/2014, a provisional valuation such as valuation 2 is a valid basis for adopting the resolution scheme.

318 It is sufficient to note that, according to settled case-law, the legality of an EU measure is assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see judgment of 3 September 2015, *Inuit Tapiriit Kanatami and Others* v *Commission*, C-398/13 P, EU:C:2015:535, paragraph 22 and the case-law cited). It follows that elements post-dating the adoption of the EU measure cannot be taken into account in assessing the legality of that measure (see judgment of 17 December 2014, *Si.mobil* v *Commission*, T-201/11, EU:T:2014:1096, paragraph 64 and the case-law cited).

319 It follows that the issue whether or not an *ex post* definitive valuation was carried out manifestly after the adoption of the resolution scheme cannot affect the validity of the contested decisions. The third complaint must therefore be rejected as ineffective.

320 It follows from all of the foregoing that the fourth plea in law must be rejected.

The fifth plea in law, alleging infringement of Article 18(1)(a) and (b) of Regulation No 806/2014

321 The applicants submit that the SRB and the Commission infringed Article 18(1)(a) and (b) of Regulation No 806/2014 by finding that the conditions laid down in those provisions had been met.

322 Article 18(1) of Regulation No 806/2014 provides that the SRB is to adopt a resolution scheme only when it assesses that the following conditions are met:

> ‘(a) the entity is failing or is likely to fail;
>
> (b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an [institutional protection scheme (IPS)], or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments in accordance with Article 21, taken in respect of the entity, would prevent its failure within a reasonable time frame;
>
> (c) a resolution action is necessary in the public interest pursuant to paragraph 5.’

323 This plea in law is divided into two parts corresponding to the two conditions laid down in Article 18(1)(a) and (b) of Regulation No 806/2014.

The first part, alleging infringement of Article 18(1)(a) of Regulation No 806/2014

324 The applicants submit that the information set out in the resolution scheme is insufficient to demonstrate that the condition laid down in Article 18(1)(a) of Regulation No 806/2014 had been met. They argue that, as at the date of the resolution, Banco Popular was facing a temporary liquidity problem caused by a run on deposits, but was not facing a problem with solvency. In their view, it is apparent from the resolution scheme that the ECB’s conclusion that that condition had been met was based on the fact that Banco Popular’s liquidity situation had deteriorated rapidly. According to the expert cited by the applicants, a temporary liquidity crisis was insufficient to establish that Banco Popular was failing or likely to fail.

325 It should be noted, first, that, on 6 June 2017, the ECB carried out an assessment as to whether Banco Popular was failing or likely to fail, after consulting the SRB, in accordance with the second subparagraph of Article 18(1) of Regulation No 806/2014. In that assessment, the ECB, taking into account, in particular, the excessive deposit outflows, the speed at which liquidity had been lost from the bank and the inability of the bank to generate further liquidity, considered that there were objective elements indicating that Banco Popular was likely, in the near future, to be unable to pay its debts or other liabilities as they fell due. The ECB concluded that Banco Popular was deemed to be failing, or in any case likely to fail in the near future, in accordance with Article 18(1)(a) and (4)(c) of Regulation No 806/2014.

326 In that regard, the extract from the letter from the President of the Supervisory Board of the ECB of 25 July 2017 to a Member of the European Parliament, cited by the applicants in the application, merely confirms that the ECB found that Banco Popular was failing or likely to fail on account of its liquidity situation and not its balance sheet insolvency. That letter explained:

'The aforementioned ECB decision that the bank was failing or likely to fail was taken on the basis of insufficient liquidity. At this time, the objective elements were not sufficient for the ECB to determine that the institution was failing or likely to fail on the basis of its capital position. Of course, the ECB had been closely monitoring not only the liquidity but also the capital position of the bank. Its structural problems (high level of non-performing assets, low coverage, poor profitability) were reflected in commensurate capital requirements established by the ECB.'

327 Secondly, by letter of 6 June 2017, the Board of Directors of Banco Popular informed the ECB that it had reached the conclusion that the bank was likely to fail.

328 In its letter to the ECB of 6 June 2017, Banco Popular refers to the notification made to the ECB pursuant to Article 414 of Regulation No 575/2013 concerning the breach of the liquidity coverage ratio minimum requirement, and to the assessment carried out by its board of directors, set out in the annex, according to which Banco Popular was likely to fail, and to the information and analyses on which the board of directors relied in order to reach that conclusion.

329 That letter states:

'Pursuant to Article 21.4 of Spanish Law 11/2015 and Articles 45 and 46 of Commission Delegated Regulation (EU) 2016/1075 [of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges (OJ 2016 L 184, p. 1)], Banco Popular hereby notifies that its board of directors has assessed that the institution is likely to fail.'

330 Thirdly, in Article 2 of the resolution scheme, the SRB referred to the conclusion of the ECB's assessment and stated, in Article 2.2, that, following the ECB's assessment, the condition laid down in Article 18(1)(a) of Regulation No 806/2014 had been satisfied.

331 Thus, in the present case, the finding that Banco Popular was failing or likely to fail was made on the basis of Article 18(4)(c) of Regulation No 806/2014, according to which, for the purposes of point (a) of paragraph 1 of that article, an entity is deemed to be failing or likely to fail in the following circumstance:

'the entity is, or there are objective elements to support a determination that the entity will, in the near future, be unable to pay its debts or other liabilities as they fall due'.

332 In the first place, it should be noted that neither the ECB nor the SRB relied on the situation provided for in Article 18(4)(b) of Regulation No 806/2014, according to which an entity is deemed to be failing or likely to fail where 'the assets of the entity are, or there are objective elements to support a determination that the assets of the entity will, in the near future, be less than its liabilities'.

333 Thus, the insolvency of the entity is not a condition for a finding that it is failing or likely to fail on the basis of Article 18(4)(c) of Regulation No 806/2014 and, therefore, is not a condition for the adoption of a resolution scheme.

334 In that regard, according to recital 57 of Regulation No 806/2014:

'The decision to place an entity under resolution should be taken before a financial entity is balance sheet insolvent and before all equity has been fully wiped out. Resolution should be initiated after the determination that an entity is failing or is likely to fail and that no alternative private sector measures would prevent such failure within a reasonable time frame.'

335 Therefore, contrary to what the applicants submit, Banco Popular's insolvency was not a condition for it to be regarded as failing or likely to fail within the meaning of Article 18(1)(a) of Regulation No 806/2014. The fact that an entity is balance sheet solvent does not mean that it has sufficient liquidity, that is to say that it has funds available to settle its debts or other liabilities as they fall due.

336 In the second place, it should be noted that, in recital 23 of the resolution scheme, the SRB, referring to the assessment carried out by the ECB, found that Banco Popular's liquidity situation had significantly deteriorated since October 2016 as a result of withdrawals of deposits across all customer segments. The SRB inferred from this that the bank did not have sufficient options to restore its liquidity position in order to ensure that it would be in a stable position to meet its liabilities as they fell due.

337 In the resolution scheme, the SRB listed the various events which had led, since February 2017, to a rapid deterioration in Banco Popular's liquidity position. The SRB refers, inter alia, to the publication, in February 2017, of Banco Popular's annual report for 2016 in which it announced a consolidated loss of EUR 3 485 billion, a need for extraordinary provisions amounting to EUR 5.7 billion, and the appointment of a new chairman, and refers to the publication, in May 2017, of the financial report for the first quarter of 2017, in which it announced results which were worse than those expected by the market. The SRB mentioned the downgrading of Banco Popular by various ratings agencies in February, April and June 2017. It also noted that the continuous negative press coverage on the financial results and the allegedly imminent risk of Banco Popular's insolvency or illiquidity had led to an increase in deposit outflows.

338 In addition, the SRB indicated in the resolution scheme that, on 12 May 2017, Banco Popular's liquidity coverage requirement had fallen below the minimum threshold of 80% set by Article 460(2)(c) of Regulation No 575/2013 and that Banco Popular had not succeeded in restoring its compliance with that limit on the date of the resolution scheme.

339 Article 412(1) of Regulation No 575/2013 defines the liquidity coverage requirement as follows:

'Institutions shall hold liquid assets, the sum of the values of which covers the liquidity outflows less the liquidity inflows under stressed conditions so as to ensure that institutions maintain levels of liquidity buffers which are adequate to face any possible imbalance between liquidity inflows and outflows under gravely stressed conditions over a period of thirty days. During times of stress, institutions may use their liquid assets to cover their net liquidity outflows.'

340 It is apparent from those elements that, contrary to what is claimed by the applicants, Banco Popular's liquidity problem could not be regarded as merely temporary on the date of the ECB's assessment. That is confirmed, moreover, by the fact that, on the same date, the bank itself informed the ECB that it was failing due to liquidity problems.

341 Furthermore, as the SRB states, those various elements are set out in the EBA Guidelines of 6 August 2015 on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59 (EBA/GL/2015/07) ('the EBA Guidelines').

342 The purpose of those guidelines, which have been applicable since 1 January 2016, is to provide a set of objective factors to determine whether an entity is failing or likely to fail, in accordance with the circumstances provided for in Article 32(4)(a) to (c) of Directive 2014/59. The wording of Article 32(4)(c) of Directive 2014/59 is identical to the wording of Article 18(4)(c) of Regulation No 806/2014.

343 The second subparagraph of Article 5(2) of Regulation No 806/2014 provides that the SRB, the Council and the Commission are to make every effort to comply with any guidelines and recommendations of EBA which relate to tasks of a kind to be performed by those bodies.

344 According to the EBA Guidelines, an institution is to be deemed to be failing or is likely to fail within the meaning of Article 32(4)(c) of Directive 2014/59 if it infringes the regulatory liquidity requirements, if it is unable to pay its debts or other liabilities as they fall due, or if there is objective evidence to support the conclusion that that will occur in the near future.

345 Among the factors to be taken into account, the EBA Guidelines state, inter alia, first, significant adverse developments affecting the evolution of the institution's liquidity position and the sustainability of its funding profile, as well as its compliance with the minimum requirements for liquidity as stipulated in Regulation No 575/2013 and the additional requirements imposed under Article 105 of that regulation or under any national minimum requirements for liquidity; second, a significant adverse evolution of the institution's current and future obligations, the assessment of which should consider, where relevant, expected and exceptional outflows of liquidity, including emerging signs of potential bank runs; third, developments that would be likely to impair severely the institution's reputation, in particular significant rating downgrades by one or several rating agencies if they lead to substantial outflows or the inability to renew funding or to the activation of contractual triggers based on the external ratings.

346 The various factors taken into consideration by the ECB and the SRB, in accordance with the EBA guidelines, which, moreover, are not disputed by the applicants, supported the conclusion that Banco Popular was failing or was likely to fail, within the meaning of Article 18(4)(c) of Regulation No 806/2014, on the date the resolution scheme was adopted.

347 In the third place, the applicants cannot claim that the refusal of the SRB and the Commission to grant them access to the documents on which they relied did not enable them properly to put forward arguments to dispute whether the condition laid down in Article 18(1)(a) of Regulation No 806/2014 had been satisfied.

348 It must be noted that the reference to the ECB's assessment in the resolution scheme, and in particular the reference to Article 18(4)(c) of Regulation No 806/2014, appears in the version of the resolution scheme annexed to the application. In addition, a non-confidential version of the ECB's assessment was available on the ECB's website on 14 August 2017, that is to say, before the reply was lodged.

349 Thus, as the SRB submits, the objective elements which formed the basis of the assessments establishing that Banco Popular was failing or likely to fail on account of its liquidity situation were set out in the resolution scheme and in the ECB's assessment, which were available to the applicants, at the very least before the reply was lodged.

350 Furthermore, as the SRB submits and as Banco Santander stated at the hearing, one of the applicants, as a member of the Board of Directors of Banco Popular, had direct access to information on the development of Banco Popular's financial situation.

351 It follows that the SRB and the Commission did not make a manifest error of assessment in finding that the condition laid down in Article 18(1)(a) of Regulation No 806/2014 had been satisfied.

352 Accordingly, the first part of this plea in law must be rejected.

The second part, alleging infringement of Article 18(1)(b) of Regulation No 806/2014

353 The applicants submit that the information set out in the resolution scheme is insufficient to demonstrate that the condition laid down in Article 18(1)(b) of Regulation No 806/2014 had been met. According to the applicants, there were private sector or supervisory measures, other than resolution, which the SRB and Commission should have examined.

354 In Article 3 of the resolution scheme, the SRB, taking into account the ECB's assessment, concluded that there was no alternative measure capable of preventing the failure of Banco Popular within a reasonable time frame and that the condition laid down in Article 18(1)(b) of Regulation No 806/2014 had been met.

355 More specifically, in Article 3.2 of the resolution scheme, the SRB stated that there was no reasonable prospect that alternative private sector measures could prevent the failure of Banco Popular. The lack of such measures could be inferred, inter alia, from the following circumstances:

– the bank itself acknowledged in a letter sent to the ECB on 6 June 2017 that it was likely to fail;

– the private sale process had not led to a positive outcome within a time frame that would have allowed the bank to pay its debts or other liabilities as they fell due;

– it was unlikely that the bank would be in a position to mobilise sufficient additional liquidity through regular market transactions or central bank operations or through the measures foreseen in its contingency funding and recovery plans within the necessary time frames;

– emergency liquidity assistance would have been insufficient with regard to the timing of the deterioration of the liquidity position.

356 In Article 3.3 of the resolution scheme, the SRB took the view that there was no reasonable prospect that any supervisory action, including early intervention measures, could prevent the failure of Banco Popular. The SRB stated that, in the ECB's assessment that Banco Popular was failing or likely to fail, the ECB had confirmed that there were no available supervisory or early intervention measures that could restore the bank's liquidity position immediately and which would allow it to have sufficient time to implement a corporate transaction or other solution. The measures available to the ECB as competent authority, under the national transposition of Article 104 of Directive 2013/36 and Articles 27 to 29 of Directive 2014/59 or under Article 16 of Regulation No 1024/2013, could not ensure that the bank would be in a position to meet its liabilities and other debts as they fell due, in view of the extent and pace of the deterioration of the liquidity position observed.

357 In Article 3.4 of the resolution scheme, the SRB took the view that there was also no reasonable prospect that the exercise of the power to write down and convert capital instruments, in accordance with Article 21 of Regulation No 806/2014, would prevent Banco Popular from failing within a reasonable time frame. In particular, the SRB considered that, given that Banco Popular was failing or likely to fail due to its liquidity position, the write-down and conversion of capital would not be sufficient to restore the bank's liquidity situation.

358 In the application, the applicants claim that the information in the version of the resolution scheme published by the SRB, in particular Articles 3.1 to 3.4, is largely redacted and, therefore, is insufficient to demonstrate that the condition laid down in Article 18(1)(b) of Regulation No 806/2014 had been satisfied.

359 In that regard, it is sufficient to note that, in the less redacted versions published by the SRB on its website in turn on 2 February and 31 October 2018, that is to say, before the reply was lodged, those paragraphs appear in their entirety.

360 In the reply, the applicants submit that the refusal by the SRB and the Commission to grant them access to the documents on which they relied has not enabled the applicants to respond to the arguments raised in the defences. However, the applicants do not specify the arguments to which they are unable to respond.

361 In the first place, the applicants claim that the absence of any other private sector measure was simply 'inferred' from certain factors by the SRB, which is insufficient to satisfy the requirements laid down in Article 18(1)(b) of Regulation No 806/2014. The first factor is the letter sent by Banco Popular to the ECB on 6 June 2017, according to which Banco Popular considered that it was likely to fail. That letter cannot be relied on in support of the condition laid down in Article 18(1)(b) of Regulation No 806/2014. The second factor is the assertion that the private sale process did not come to fruition within a period that would have enabled Banco Popular to pay its debts and other liabilities as they fell due. That process did not come to fruition because of the SRB, and the statements made by its chairman contributed to Banco Popular's liquidity problems.

362 As regards the letter of 6 June 2017 from Banco Popular to the ECB, cited in paragraphs 328 and 329 above, in their description of the content of that letter in their response to the statements in intervention, the applicants acknowledge that Banco Popular's Board of Directors had reached the conclusion that the bank faced serious liquidity problems and that it was likely to fail.

363 It must be held that, by informing the ECB that Banco Popular was likely to fail, the Board of Directors necessarily acknowledged that there was no longer any solution to avoid that situation. Contrary to the applicants' submission, the content of that letter is therefore relevant for assessing whether the condition laid down in Article 18(1)(b) of Regulation No 806/2014 had been met.

364 As regards the finding in the resolution scheme that the private sale process had not led to a positive outcome within a time frame that would have allowed the bank to settle its debts or other liabilities as they fell due, that is also a relevant fact which enabled the SRB to conclude that that sale did not constitute a private sector measure capable of preventing Banco Popular's failure within the meaning of Article 18(1)(b) of Regulation No 806/2014.

365 As regards the applicants' argument that that private sale did not come to fruition because of the SRB, and in particular the statements of its chairman, it is sufficient to note that that argument is based merely on an unsubstantiated claim and that it is, in any event, ineffective. Under Article 18(1)(b) of Regulation No 806/2014, the SRB had to find that there were no private sector solutions which could have been alternatives to the resolution and stated, objectively, that the private sale process initiated by Banco Popular had not come to fruition. In that regard, the reasons why that private solution was not conceivable were irrelevant.

366 Furthermore, contrary to what the applicants submit, it is apparent from Articles 3.1 to 3.4 of the resolution scheme that the SRB did not rely solely on those two elements to conclude that it was not possible to use any other private sector measure. The SRB also found that it was unlikely that the bank would be able to mobilise sufficient additional liquidity through market transactions or central bank operations or through the measures foreseen in its contingency funding and recovery plans within the necessary time frames and that emergency liquidity assistance would have been insufficient in view of the speed of the deterioration in the liquidity position.

367 In the second place, the applicants submit that the SRB has provided no evidence in support of the assertion in the resolution scheme that there was no reasonable prospect that any supervisory action, including early intervention measures, could have prevented the failure of Banco Popular. The SRB did not take into account the possibility of emergency liquidity assistance, which would have allowed sufficient time to complete the private sale process or to ensure that there were no alternative private sector measures such as the sale of assets or an increase in capital. According to the expert report annexed to the application, Banco Popular had sufficient guarantees to justify the grant of emergency liquidity assistance, and resolution could have been avoided.

368 The applicants submit that it is apparent from two letters from the Bank of Spain to the ECB of 5 June 2017 that a guarantee had been given by Banco Popular to justify the grant of the full amount of the requested emergency liquidity assistance. The Bank of Spain stated that that emergency liquidity assistance would have been sufficient to meet Banco Popular's short-term liquidity needs. The ECB approved the provision of the requested emergency liquidity assistance, and the amount of that assistance would have allowed Banco Popular to complete its sale process or capital-raising programme. The applicants state that they do not know why the emergency

liquidity assistance which had been approved by the Bank of Spain and the ECB was not granted. They submit that it was only after the ECB declared that Banco Popular was failing or likely to fail that the Bank of Spain withdrew its approval to grant that emergency liquidity assistance.

369 It must be noted that, on 6 June 2017, in its assessment that Banco Popular was failing or likely to fail, the ECB stated that, although Banco Popular had developed various additional liquidity generating measures over the preceding weeks and started to implement them, the magnitude of the realised and still expected inflows was insufficient to remediate the depletion of Banco Popular's liquidity position on the date of the assessment. The ECB stated that, even with the recourse to the emergency liquidity assistance in respect of which the Governing Council of the ECB had not raised any objections on 5 June 2017, the liquidity situation on that date did not suffice to ensure Banco Popular's ability to meet its liabilities by 7 June 2017 at the latest.

370 In recital 26(c) of the resolution scheme, the SRB stated that Banco Popular had received an initial emergency liquidity assistance on 5 June 2017, following the absence of any objection from the ECB, but that the Bank of Spain had not been in a position to grant Banco Popular further emergency liquidity assistance.

371 In that regard, it should be noted that, in a letter of 5 June 2017, the Bank of Spain asked the ECB for its agreement to grant Banco Popular emergency liquidity assistance in order to deal with the severe liquidity crisis from which Banco Popular was suffering. On the same day, the Bank of Spain sent a further letter to the ECB containing a request for an extension of the emergency liquidity assistance to Banco Popular, the latter having informed it of extremely substantial liquidity movements. Those two letters sent the same day to the ECB reveal the speed with which Banco Popular's liquidity situation had deteriorated.

372 The SRB thus found, in Article 3.2(d) of the resolution scheme, that emergency liquidity assistance would have been insufficient with regard to the timing of the deterioration of Banco Popular's liquidity position.

373 It must be noted that, the day after that first emergency liquidity assistance, that is to say, on 6 June 2017, because of the scale and speed of the withdrawals of liquidity, the ECB and Banco Popular's Board of Directors concluded that the bank would no longer be in a position to pay its debts or other liabilities as they fell due on 7 June 2017. Thus, as Banco Popular was found to have failed, emergency liquidity assistance was no longer possible.

374 In addition, it should be noted that the SRB plays no role in the provision of emergency liquidity assistance which falls within the remit of the national central banks.

375 Therefore, in the resolution scheme, the SRB could only find, first, that the ECB, in its assessment that Banco Popular was failing or likely to fail, had taken the view that the emergency liquidity assistance which it had approved did not enable Banco Popular's liquidity crisis to be resolved and, secondly, that the Bank of Spain had not granted further emergency liquidity assistance to Banco Popular.

376 The SRB could not therefore take into account a solution which was not within its remit and which was no longer possible once the ECB and Banco Popular itself had taken the view that the bank was failing or was likely to fail.

377 It follows that the applicants cannot criticise the SRB for not taking into account the possibility of emergency liquidity assistance that would have allowed sufficient time to adopt a private sector measure, to complete the private sale process or to ensure that there were no alternative private sector measures.

378 As regards the applicants' argument that they did not know why the Bank of Spain had not granted further emergency liquidity assistance, suffice it to state that that argument is ineffective. Given that the SRB could only take note of the Bank of Spain's refusal to provide further emergency liquidity assistance to Banco Popular, the grounds for that refusal are not relevant to the assessment of the lawfulness of the contested decisions.

379 It follows that the expert report of 3 August 2017, annexed to the application, containing an analysis of the resolution scheme, is also irrelevant in so far it establishes, according to the applicants, that Banco Popular had sufficient guarantees to receive emergency liquidity assistance.

380 Therefore, contrary to what the applicants submit, emergency liquidity assistance was not an alternative to resolution.

381 In the third place, the applicants submit that there were private sector solutions capable of resolving Banco Popular's liquidity problems and of being implemented within a reasonable time frame. They list a certain number of measures and state that they could have been implemented if the Bank of Spain had been authorised to grant all of the requested emergency liquidity assistance.

382 As Banco Santander states, those solutions are based on the incorrect premiss that Banco Popular could have received further emergency liquidity assistance on 6 June 2017.

383 It must be held that, in so far as it has been found that the SRB could only have taken note, in the resolution scheme, of the fact that the Bank of Spain had not been in a position to grant further emergency liquidity assistance to Banco Popular, the applicants have not demonstrated the feasibility of the private sector solutions which they put forward.

384 In any event, the applicants have not established that the solutions which they put forward could have been implemented within a sufficiently short time frame to enable Banco Popular to resolve its liquidity problem and not to be declared as failing or likely to fail on 6 June 2017.

385 First, the applicants submit that Banco Popular's shareholders approved, at the annual meeting of 10 April 2017, a delegation to the board of directors in order to authorise a capital increase of up to 50% of the bank's share capital. They also rely on documents annexed to the application, in particular the statements made by two of the shareholders, Mr Del Valle Ruíz and Mr Ruiz Sacristán, according to which significant interested parties were prepared to inject considerable sums of capital to help Banco Popular overcome its short-term liquidity problems. That capital injection would have restored confidence in the bank and would have afforded additional time for the private sale process to be carried out.

386 The applicants also state that, in May 2017, Deutsche Bank had taken the view that Banco Popular needed a capital injection of EUR 4 billion and Mr Del Valle Ruíz and other investors were prepared to provide up to 50% of that amount, and that, on 3 June 2017, Barclays Bank proposed to Banco Popular that it could participate in that capital increase and that, on 5 June 2017, Deutsche Bank informed Banco Popular that it was interested in providing up to EUR 2 billion of

that capital increase. In addition, at the end of May 2017, Pacific Investment Management Company LLC (PIMCO) undertook to provide up to EUR 300 million in the event of a capital increase.

387 Suffice it to note that it is apparent from the statements of Mr Del Valle Ruíz and Mr Ruiz Sacristán, annexed to the application, that the proposed capital increase by Banco Popular's shareholders was only at a preparatory stage at the date of the resolution. Thus, the applicants refer, in the application, to an extract from the statement of Mr Del Valle Ruíz, in which he indicates that he and another investor discussed, on 2 June 2017, the organisation of a meeting with an investment bank on how best to structure the capital increase and that that meeting had been scheduled for 5 June 2017.

388 As regards the letters from Barclays Bank and Deutsche Bank, they do not contain any firm commitment on the part of those banks to increase Banco Popular's capital, but merely reflect discussions on a potential future capital increase. Those letters show that, on the date they were sent, the proposed increase in Banco Popular's capital was still only at a very early stage.

389 Thus, in its letter of 3 June 2017 to Banco Popular, an extract of which is annexed to the reply, Barclays Bank refers only to recent discussions concerning a capital increase, the aim of which was, for Banco Popular, to cover its additional provisioning needs and to reach significantly higher levels of capital, in order to mitigate the challenges it was facing as a result of a particular real estate exposure and other non-performing assets. Thus, in the extract from that letter, first, there is nothing to indicate that Barclays Bank was willing to participate in that capital increase and, second, Barclays Bank does not refer to the liquidity crisis faced by Banco Popular, and does not propose any solution to remedy that crisis.

390 By letter lodged at the Court Registry on 7 October 2019, the applicants produced as new evidence, pursuant to Article 85(3) of the Rules of Procedure, a full version of that letter.

391 Article 85(3) of the Rules of Procedure provides that the main parties may, exceptionally, produce or offer further evidence before the oral part of the procedure is closed, provided that the delay in the submission of such evidence is justified.

392 In their letter of 7 October 2019, the applicants justify the late production of that document by the fact that it has been disclosed in the media and is now in the public domain, but that it was not yet in the public domain on the date on which their observations on the statements in intervention were lodged on 30 September 2019.

393 It must be noted that the applicants do not specify the date on which that document was disclosed in the media. In that regard, the SRB, in its observations on that production of new evidence, stated that an unredacted version of that letter had been published on the *Diario16* website on 9 April 2019.

394 It follows that, contrary to what the applicants maintain, an unredacted version of Barclays Bank's letter was in the public domain before they submitted their observations on the statements in intervention. It follows that the applicants have not justified the late production of that document and that it must be rejected as inadmissible, without it being necessary to examine its probative value.

395 In any event, it must be noted that the content of that letter does not support the applicants' argument that a capital increase was a viable alternative and does not establish that Barclays Bank intended to participate financially in a future increase in Banco Popular's capital. In that letter, Barclays Bank reaffirmed its support for Banco Popular and stated that it was in a position to assist it in that important transaction. Barclays Bank expressed its interest in acting as a global coordinator or bookrunner for 50% of the transaction under market conditions. It added legal reservations, confirmed by the covering email, stating that 'any actual commitment or offer in connection with any such underwriting would be reflected in a separate agreement or agreements to be entered into between [Banco] Popular and [Barclays Bank], subject to satisfactory market conditions, completion of satisfactory due diligence, agreement on terms and pricing at the time … and completing all required internal approvals'. Finally, Barclays Bank stated that that letter did not constitute an offer to underwrite the transaction or any financing and was not intended to create a legal relationship between it and Banco Popular.

396 In its letter of 5 June 2017 to Banco Popular, annexed to the reply, Deutsche Bank mentions only its interest in providing 50% of a possible capital increase of EUR 4 billion. The letter merely states that 'there are clearly certain conditions, but the letter is based on our conviction that, in circumstances which we believe can realistically be satisfied, a [capital] increase could be achieved which would stabilise the bank'. That letter cannot therefore be interpreted as containing a firm commitment from Deutsche Bank and does not concern a solution aimed at resolving Banco Popular's liquidity crisis.

397 As regards the applicants' assertion concerning PIMCO's participation in a capital increase, that assertion is based on a quotation from an article in *El Mundo* of 11 December 2017. It is sufficient to note that, as the Commission submits, in that article, it is also stated that PIMCO did not confirm its activities regarding Banco Popular.

398 Secondly, the applicants claim that Banco Popular was also preparing to sell non-strategic assets.

399 It is sufficient to note that that mere assertion in the application is not based on any evidence, since the documents annexed to the reply, to which the applicants refer, do not concern planned sales of assets. In any event, as the applicants state, those were merely planned sales. Thus, the applicants have not established that such sales of assets, which were only at a preparatory stage, could have been completed within several weeks and could have occurred within a time frame that would have been sufficient to enable Banco Popular to find enough liquidity to meet its liabilities on 7 June 2017.

400 Thirdly, first, the applicants submit that BBVA wished to make an offer to purchase Banco Popular, but that the SRB and the FROB did not give it sufficient time to submit a competitive bid, and that the contested decisions precluded a competitive sale.

401 That argument is irrelevant, since the procedure for the sale of Banco Popular referred to by the applicants does not concern an alternative solution to resolution, but the sale procedure organised by the FROB in the context of the resolution procedure.

402 Second, the applicants claim that, if all of the requested emergency liquidity assistance had been granted, a better offer for the acquisition of Banco Popular would have been made and that Banco Santander was prepared to pay EUR 200 million, but that it withdrew its offer when it learned that it was the only bidder.

403 It is sufficient to note that that argument is based on the incorrect premiss that further emergency liquidity assistance would have been granted to Banco Popular. Moreover, it is an unsubstantiated assertion that Banco Santander was prepared to make a higher bid and that it was informed that it was the only bidder before the end of the sale procedure organised by the FROB.

404 It follows from the foregoing that the applicants have not established that the alternative measures on which they rely were capable of being implemented quickly and could have enabled Banco Popular to restore its liquidity position within a sufficiently short time frame, and it follows the applicants have therefore failed to demonstrate that the SRB made a manifest error of assessment in finding that there were no alternative measures to resolution that would have been capable of preventing Banco Popular from failing or being likely to fail on 6 June 2017.

405 Moreover, the applicants cannot criticise the SRB for not having taken into consideration the measures which they put forward. As the Commission and the SRB state, the SRB was fully entitled to limit its assessment to the measures which could actually have been implemented in the light of the relevant circumstances and the prescribed deadlines.

406 Thus, the SRB was not required to take into account measures which could not resolve the urgent problem linked to the rapid deterioration in Banco Popular's liquidity situation, that rapid deterioration being the cause of the bank failing or being likely to fail.

407 It follows from the foregoing that the SRB and the Commission did not make a manifest error of assessment in finding that the condition laid down in Article 18(1)(b) of Regulation No 806/2014 had been met.

408 Accordingly, the second part of this plea in law must be rejected and, therefore, the fifth plea in law must be rejected as unfounded.

The sixth plea in law, alleging infringement of Article 21(1) of Regulation No 806/2014

409 The applicants submit that the SRB and the Commission infringed Article 21(1) of Regulation No 806/2014 by finding that the conditions for the exercise of the power to write down or convert relevant capital instruments had been met. The applicants refer to their arguments raised in the context of the fifth plea in law.

410 It is sufficient to note that, as the Commission, the SRB and the Kingdom of Spain submit, in the context of the present plea in law, the applicants merely refer to their arguments raised in the fifth plea in law and do not put forward any new argument specifically seeking to establish an infringement of Article 21(1) of Regulation No 806/2014.

411 Accordingly, since the fifth plea in law has been rejected, the sixth plea in law must also be rejected as unfounded.

The second plea in law, alleging infringement of Articles 41 and 47 of the Charter

412 The applicants submit that the contested decisions infringe, first, the right to be heard and, second, the right to effective judicial protection, enshrined in Articles 41 and 47 of the Charter.

The first complaint, relating to the right to be heard

413 The applicants submit that they were not notified of the contested decisions and that they did not have the opportunity to be heard before the decisions were adopted. The contested decisions deprive them of their right to property and the applicants were in a position to submit observations on the existence of supervisory or private sector measures as alternatives to resolution. They add that if they had been given an opportunity to submit observations during the procedure, it is likely that the SRB and the Commission would have reached a different view on whether the conditions for resolution had been met and on the valuation of Banco Popular.

414 As a preliminary point, it is apparent from the analysis of the first part of the first plea in law that the fact that Article 18 of Regulation No 806/2014 does not provide for the shareholders of the entity subject to a resolution action to be heard constitutes a limitation on the right to be heard (i) which is justified by an objective of general interest, namely the objective of ensuring the stability of the financial markets referred to in Article 14 of Regulation No 806/2014, to which the objective of ensuring the continuity of the critical functions of the entity also contributes, and by the need to adopt a decision quickly once the conditions for resolution have been met and (ii) which complies with the principle of proportionality in accordance with Article 52(1) of the Charter.

415 However, it follows from the case-law cited in paragraphs 121 and 122 above that compliance with the right to be heard must apply to any procedure which may culminate in a measure adversely affecting a person, even where the applicable legislation does not expressly provide for such a formality.

416 First of all, it must be noted that the resolution scheme adopted by the SRB at the end of the procedure laid down in Article 18 of Regulation No 806/2014 concerns the resolution of Banco Popular. The sole addressee of the resolution scheme is the FROB and Banco Popular must be regarded as the person in respect of which an individual measure was adopted and for which the right to be heard is guaranteed by Article 41(2)(a) of the Charter.

417 Thus, account must be taken of the fact that the applicants, in their capacity as shareholders or bondholders of Banco Popular, are not addressees of the resolution scheme, which is not an individual decision taken against them, nor are they addressees of Decision 2017/1246 approving that resolution scheme.

418 However, it must be noted that, in accordance with Article 21(1) of Regulation No 806/2014, the SRB exercised the power to write down or convert Banco Popular's capital instruments.

419 Therefore, the procedure followed by the SRB to adopt the resolution scheme, even though it does not constitute an individual procedure initiated against the applicants, may lead to the adoption of a measure liable to have an adverse effect on their interests in their capacity as shareholders or holders of capital instruments in Banco Popular.

420 The case-law of the Court of Justice cited in paragraph 121 above adopted a broad interpretation of the right to be heard as being guaranteed to every person during the procedure which may result in a measure adversely affecting that person.

421 However, it should also be noted that, under Article 52(1) of the Charter, cited in paragraph 131 above, and the case-law referred to in paragraph 132 above, if the applicants were able to rely on the right to be heard, enshrined in the Charter, in the procedure for the resolution of Banco Popular, that right may be subject to limitations. In particular, the failure to hear the applicants in their capacity as shareholders or holders of capital instruments in Banco Popular, in the context of the resolution procedure, whether that failure was due to the SRB or the Commission, could be justified.

422 In the present case, in Article 4.2 of the resolution scheme, the SRB stated that the resolution of Banco Popular was necessary for and proportionate to the achievement of two objectives referred to in Article 14(2) of Regulation No 806/2014, namely avoiding significant adverse effects on financial stability and ensuring the continuity of Banco Popular's critical functions.

423 In that regard, in Article 4.4.2 of the resolution scheme, the SRB explained that it had concluded that Banco Popular's situation entailed an increased risk of significant adverse effects on financial stability in Spain, on the basis of various elements. Those elements included, first, the size and relevance of Banco Popular, which was the parent company of the sixth largest banking group in Spain, with total assets of EUR 147 billion, and which was classified by the Bank of Spain in 2017 as a significant institution of a systemic nature. The SRB noted, inter alia, that Banco Popular was one of the main market participants in Spain, with a significant market share in the segment of small and medium-sized enterprises (SMEs), and that it had a relatively high market share of deposits (almost 6%) and a large number of retail clients (approximately 1.4 million) throughout Spain. Second, the SRB took into account the nature of Banco Popular's business, which was structured around commercial banking activities and focused primarily on offering financing, savings management and financial services to individuals, families and companies (in particular SMEs). According to the SRB, the similarity between Banco Popular's business model and that of other Spanish commercial banks contributes to the potential for indirect contagion to those banks which might have been perceived as facing the same difficulties.

424 In Article 4.4 of the resolution scheme, the SRB identified three critical functions of Banco Popular, within the meaning of Article 6 of Delegated Regulation 2016/778, namely deposit taking from households and non-financial corporations, lending to SMEs, and payment and cash services.

425 It must be noted that, in the fifth plea in law, the applicants alleged infringement of Article 18(1)(a) and (b) of Regulation No 806/2014, but that they did not deny that the resolution scheme was necessary in the public interest within the meaning of Article 18(1)(c) of that regulation.

426 According to Article 18(5) of Regulation No 806/2014, a resolution action is to be treated as in the public interest if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 of that regulation and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.

427 Thus, the applicants do not deny that the resolution scheme was necessary and proportionate in order to avoid the significant adverse effects of Banco Popular's failure on financial stability in the European Union and in order to ensure the continuity of Banco Popular's critical functions.

428 Accordingly, the procedure for the resolution of Banco Popular pursued an objective of ensuring the stability of the financial markets which, in accordance with the analysis carried out with regard to the first complaint of the first plea in law, constitutes an objective of general interest capable of justifying a limitation on the applicants' right to be heard, in accordance with Article 52(1) of the Charter.

429 Furthermore, it is also apparent from the analysis of the first plea in law that, where an entity satisfies the conditions for the adoption of a resolution action, Article 18 of Regulation No 806/2014 provides that a decision must be adopted within a very short period of time.

430 Thus, in the present case, once the ECB found that Banco Popular was failing or likely to fail and once the SRB considered that the conditions laid down in Article 18 of Regulation No 806/2014 had been met, the resolution scheme had to be adopted as quickly as possible.

431 That rapid decision was justified by the need to ensure the continuity of Banco Popular's critical functions and the need to avoid the significant adverse effects of Banco Popular's situation on the financial markets, by preventing, inter alia, the risks of contagion. In the present case, as Banco Popular's failure occurred on a weekday, it was necessary to complete the procedure and to adopt the decision before the opening of the markets on the morning of 7 June 2017.

432 As Advocate General Campos Sánchez-Bordona emphasised in point 80 of his Opinion in Joined Cases *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:16), the speed with which those institutions and agencies of the European Union must take their decisions is in order to ensure that the resolution of the banking institution does not have an adverse impact on the financial markets and that need for speed also requires them, de facto, to have the decision 'prepared' before they launch the procedure, in order to take advantage of the financial markets being closed.

433 Accordingly, the applicants cannot merely assert that the SRB and the Commission have not justified the speed with which they adopted the contested decisions.

434 In addition, it should be noted that a prior hearing of the applicants, informing them of the existence of an imminent resolution action, would have led to a risk of them adopting conduct on the market that could have exacerbated Banco Popular's financial situation. Such a hearing could thus have undermined the effectiveness of the planned resolution.

435 It must therefore be held that a hearing of the applicants before the adoption of the resolution scheme or before the adoption of Decision 2017/1246 would have entailed a substantial slowdown in the procedure and, therefore, would have compromised both the attainment of the objectives pursued by the resolution and its effectiveness.

436 It follows from the foregoing that the failure to hear the applicants, in the procedure leading to the adoption of the contested decisions, constituted a limitation on the right to be heard which was justified and necessary in order to meet the objective of ensuring financial stability, and complied with the principle of proportionality, in accordance with Article 52(1) of the Charter.

437 In the present case, it is apparent from the analysis of the fifth plea in law that the SRB and the Commission did not make a manifest error of assessment in finding that the conditions laid down in Article 18(1)(a) and (b) of Regulation No 806/2014 had been met, namely that Banco Popular was failing or likely to fail and that there was no reasonable prospect that alternative

private sector measures or supervisory action would prevent its failure within a reasonable time frame. It is apparent, in particular, from the analysis of the second part of the fifth plea in law that the applicants have not demonstrated that there were alternative measures capable of remedying Banco Popular's liquidity problems and therefore of preventing its resolution.

438 Accordingly, the applicants cannot claim that, if they had had the opportunity to submit observations on the existence of supervisory action or private sector measures during the procedure, the resolution scheme would not have been adopted.

439 As regards the applicants' argument that they should have been heard in so far as the contested decisions deprived them of their right to property, it is sufficient to note that it follows from the case-law cited in paragraphs 160 to 162 above that a limitation of the right to property of the shareholders and creditors of the entity concerned cannot justify an obligation to grant them a right to be heard.

440 In the light of the foregoing, the first complaint must be rejected.

The second complaint, relating to the right to effective judicial protection

441 The applicants submit that, in view of the time limits for bringing proceedings laid down in Article 263 TFEU, they were forced to bring proceedings without having received the evidence on which the contested decisions were based, which is contrary to the principle of effective judicial protection. In the reply, they state that the SRB and the Commission continue to refuse access to the documents on which the SRB and the Commission relied in the contested decisions and in their defences, which means that the applicants cannot properly bring their action, nor can the Court exercise its power of review.

442 It must be noted that, as regards the principle of effective judicial protection, the first paragraph of Article 47 of the Charter states that everyone whose rights and freedoms guaranteed by EU law are infringed has the right to an effective remedy before a court or tribunal in compliance with the conditions laid down in that article. It follows from the case-law of the Court of Justice that the effectiveness of the judicial review guaranteed by that provision requires, inter alia, that the person concerned is able to defend his or her rights in the best possible conditions and to decide, in full knowledge of the facts, whether it would be useful to bring an action against a given entity before the competent court (see judgment of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335, paragraph 57 and the case-law cited). The very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law (see judgment of 6 October 2020, *Bank Refah Kargaran* v *Council*, C-134/19 P, EU:C:2020:793, paragraph 36 and the case-law cited).

443 It is important to note that if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him or her is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information, so as to make it possible for him or her to defend his or her rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question (see judgments of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraph 55 and the case-law cited; of 24 November 2020, *Minister*

van Buitenlandse Zaken, C-225/19 and C-226/19, EU:C:2020:951, paragraph 43 and the case-law cited; and of 3 February 2021, *Ramazani Shadary* v *Council*, T-122/19, not published, EU:T:2021:61, paragraph 50 and the case-law cited).

444 In the present case, it should be noted that a non-confidential version of the resolution scheme was published on the SRB's website on 11 July 2017 and that Decision 2017/1246 was published in the *Official Journal of the European Union* on 11 July 2017. The applicants, having had access to those documents, have been able to challenge them before the Court by way of the present action, brought on the basis of Article 263 TFEU, which establishes the existence of their right to an effective remedy.

445 Furthermore, it should be noted that the SRB published on its website on 2 February and 31 October 2018, that is, before the reply was lodged, valuation 1 and less redacted versions of the resolution scheme and valuation 2. Those publications were aimed at giving the public access to parts of those documents which were originally considered to be confidential. The applicants therefore had the opportunity to supplement their arguments in the light of the new information resulting from those publications.

446 In the first place, the applicants complain that the SRB did not give them access to the full versions of the resolution scheme and valuation 2.

447 In that regard, it must be noted that the applicants are not the addressees of the resolution scheme, which is addressed to the FROB. The applicants must be regarded as third parties and therefore do not have the right to be notified of the resolution scheme.

448 Under Article 29(5) of Regulation No 806/2014, the SRB is to publish on its official website either a copy of the resolution scheme or a notice summarising the effects of the resolution action, and in particular the effects on retail customers.

449 In the present case, on 7 June 2017, the SRB published on its website a notice regarding the adoption of the resolution scheme, together with a document summarising the effects of the resolution in accordance with Article 29(5) of Regulation No 806/2014. In addition, on 11 July 2017, the SRB published a non-confidential version of the resolution scheme. The SRB also published on its website, on 2 February 2018 and then on 31 October 2018, less redacted non-confidential versions of the resolution scheme and valuation 2.

450 Furthermore, Article 88(5) of Regulation No 806/2014 provides:

'Before any information is disclosed, the [SRB] shall ensure that it does not contain confidential information, in particular, by assessing the effects that the disclosure could have on the public interest as regards financial, monetary or economic policy, on the commercial interests of natural and legal persons, on the purpose of inspections, on investigations and on audits. The procedure for checking the effects of disclosing information shall include a specific assessment of the effects of any disclosure of the contents and details of resolution plans as referred to in Articles 8 and 9, the result of any assessment carried out under Article 10 or the resolution scheme referred to in Article 18.'

451 That provision expressly lays down an obligation on the SRB to ensure, prior to the publication or communication of the resolution scheme to a third party, that that scheme does not contain confidential information. That obligation also applies to valuation 2, which is an annex to the resolution scheme and forms an integral part of it, pursuant to Article 12.2 of that scheme.

452 It must be noted in that regard that the Court of Justice has already held that a Commission decision finding that there is no State aid alleged by a complainant may, in the light of the obligation to respect business secrecy, be sufficiently reasoned without including all the figures on which that institution's reasoning is based (see, to that effect, judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraphs 108 to 111). Accordingly, where a non-confidential version of such a decision discloses in a clear and unequivocal fashion the reasoning followed by that institution and the methodology used by it, in such a way as to enable the persons concerned to ascertain those reasons and the General Court to exercise its power of review in respect of them, that is sufficient to satisfy that institution's obligation to state reasons (see, to that effect, judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 55).

453 Moreover, as regards the economic elements used by Deloitte in valuation 2 and taken into account by the SRB in the resolution scheme, they undeniably concern complex technical appraisals. Since the resolution scheme clearly disclosed the SRB's reasoning, enabling the substance of that scheme to be challenged subsequently before the competent court, it would be excessive to require a specific statement of reasons for each of the technical choices or each of the figures on which that reasoning is based (see, by analogy, judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 108 and the case-law cited).

454 First, that the applicants do not deny that the resolution scheme and valuation 2 contain confidential information which the SRB is obliged to protect. Second, the applicants have not explained to what extent the economic data which remained redacted in the non-confidential versions of the resolution scheme and valuation 2 were necessary in order to understand the resolution scheme and for them to exercise their right to an effective judicial remedy.

455 It must therefore be held that the applicants cannot claim that they are entitled to be provided with the full versions of the resolution scheme and valuation 2.

456 In the second place, by challenging the fact that the SRB and the Commission did not communicate, before the adoption of the contested decisions, the documents on which they relied in order to adopt those decisions, the applicants claim that there has been an infringement of the right of access to the file, enshrined in Article 41(2)(b) of the Charter.

457 Article 41(2)(b) of the Charter, relating to the right to good administration, provides that that right includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.

458 The right of access to the file is provided for in Article 90(4) of Regulation No 806/2014, according to which:

'Persons who are the subject of the [SRB's] decisions shall be entitled to have access to the [SRB's] file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or internal preparatory documents of the [SRB].'

459 In that regard, it must be noted, first, that access to the file in competition cases is intended in particular to enable the addressees of the statement of objections to acquaint themselves with the evidence in the Commission's file, so that they can express their views effectively on the

conclusions reached by the Commission in its statement of objections, on the basis of that evidence. That right of access to the file means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for that undertaking's defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information (see judgment of 14 May 2020, *NKT Verwaltung and NKT* v *Commission*, C-607/18 P, not published, EU:C:2020:385, paragraphs 261 and 262 and the case-law cited).

460 Secondly, according to settled case-law of the Court of Justice, observance of the rights of the defence in a proceeding before the Commission, the aim of which is to impose a fine on an undertaking for infringement of competition rules, requires that the undertaking concerned must have been afforded the opportunity to make known its views on the truth and relevance of the facts and circumstances alleged as well as on the documents used by the Commission to support its claim that there has been an infringement. Those rights are referred to in Article 41(2)(a) and (b) of the Charter (see judgment of 28 November 2019, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, C-591/18 P, not published, EU:C:2019:1026, paragraph 26 and the case-law cited).

461 Thirdly, as regards, more generally, observance of the rights of the defence as enshrined in Article 41(2) of the Charter, that includes the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality (see judgment of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 99 and the case-law cited; judgment of 2 December 2020, *Kalai* v *Council*, T-178/19, not published, EU:T:2020:580, paragraph 73).

462 Fourthly, it should be noted that infringement of the right of access to the Commission's file during the procedure prior to adoption of a decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed (see judgments of 25 October 2011, *Solvay* v *Commission*, C-109/10 P, EU:C:2011:686, paragraph 55 and the case-law cited, and of 15 July 2015, *Akzo Nobel and Others* v *Commission*, T-47/10, EU:T:2015:506, paragraph 349 (not published) and the case-law cited).

463 It follows from the case-law cited in paragraphs 459 to 462 that both the right of access to the file enshrined in Article 41(2)(b) of the Charter and, more specifically, access to the file in competition cases, concern persons or undertakings subject to proceedings opened or decisions taken against them.

464 In the present case, first, it follows from Article 90(4) of Regulation No 806/2014 that the right of access to the file concerns the entity that is the subject of the resolution scheme, namely Banco Popular, and not its shareholders or creditors. Second, it follows from the examination of the first complaint that the applicants did not have a right to be heard in the procedure which led to the adoption of the resolution scheme.

465 Accordingly, the applicants cannot claim a right of access to the file.

466 Furthermore, both Article 41(2)(b) of the Charter and Article 90(4) of Regulation No 806/2014 provide that certain information may be protected if it is confidential.

467 The applicants cannot therefore claim that the fact that the SRB and the Commission did not disclose the documents on which they relied during the administrative procedure which led to the adoption of the resolution scheme constitutes an infringement of the right of access to the file enshrined in Article 41(2)(b) of the Charter.

468 In the third place, the applicants submit, in essence, that they were unable to exercise their right to an effective remedy since they did not have access to the documents on which the SRB and the Commission relied in the contested decisions, after the adoption of those decisions. The applicants complain that the SRB and the Commission did not annex those documents to their defence and did not explain why those documents were confidential. The applicants submit that, even if those documents contain confidential information, their representatives could have access to the documents in the present proceedings.

469 It should be noted that there is no provision guaranteeing the applicants a right of access to the full versions of the resolution scheme and valuation 2 or to the other documents on which the SRB relied in order to adopt the resolution scheme, since the SRB has an obligation to protect the confidentiality of certain information.

470 The SRB and the Commission are under an obligation to protect the confidential data of all entities, including business secrets, under Article 339 TFEU, Article 41(2)(b) of the Charter and Article 88(1) and (3) of Regulation No 806/2014.

471 In addition, the Court of Justice has held, with regard to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1), that the effective monitoring of the activities of investment firms, through supervision within a Member State and the exchanging of information by the competent authorities of several Member States, requires that both the supervised entities and the competent authorities can have confidence that the confidential information provided will, in principle, remain confidential (see judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraph 31 and the case-law cited).

472 The Court of Justice has considered that the absence of such confidence is liable to compromise the smooth transmission of the confidential information that is necessary for monitoring. Therefore, in order to protect not only the specific interests of the firms directly concerned, but also the public interest in the normal functioning of the markets in financial instruments of the European Union, Article 54(1) of Directive 2004/39 imposes, as a general rule, the obligation to maintain professional secrecy (see judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraphs 32 and 33 and the case-law cited).

473 It must be noted that Article 88(1) of Regulation No 806/2014, on the requirements of professional secrecy of members of the SRB, contains a provision equivalent to that of Article 54(1) of Directive 2004/39.

474 Furthermore, according to Article 34(1) of Regulation No 806/2014, for the purpose of performing its tasks under that regulation, the SRB may, through the national resolution authorities or directly, after informing them, making full use of all of the information available to the ECB or to the national competent authorities, require, inter alia, the entities covered by a resolution action to provide all of the information necessary to perform the tasks conferred on it by that

regulation. Paragraph 2 of that article states that the requirements of professional secrecy do not exempt those entities from the duty to supply that information. Article 34(4) of Regulation No 806/2014 provides that the SRB is to be able to obtain, including on a continuous basis, any information necessary for the exercise of its functions under that regulation, in particular on capital, liquidity, assets and liabilities concerning any institution subject to its resolution powers.

475 The documents on which the SRB relied in order to adopt the resolution scheme, in particular the documents relating to Banco Popular's liquidity situation, its request for emergency liquidity assistance and the ECB's assessment that Banco Popular was failing or likely to fail, contain confidential information, in particular business secrets, which the SRB is under a duty to protect.

476 It follows that the applicants did not have a right of access to all of the documents on which the SRB and the Commission relied in order to adopt the contested decisions, since those documents are likely to contain confidential information, which the applicants do not dispute. The applicants cannot therefore rely on that refusal to grant access to those documents in order to claim that there has been an infringement of their effective judicial protection.

477 Furthermore, as regards the documents which, according to the applicants, form the basis of the contested decisions and the defences, the applicants refer, as an annex to the application, to their various requests for access to the documents sent to the Commission, to the SRB and to the ECB, on the basis, in particular, of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). In the reply, they refer to the refusal of the SRB and the Commission to grant them access to the documents which they requested in the context of those proceedings.

478 It is sufficient to note that the replies to those requests for access are the subject of a separate action before the Court.

479 The applicants also refer to their application for measures of organisation of procedure on the basis of Article 88 of the Rules of Procedure, lodged at the Court Registry on 9 October 2018, seeking an order requiring the SRB and the Commission to produce a certain number of documents, the list of which is annexed to that application.

480 In that regard, the Court has the power to request the SRB to produce any document which the Court considers relevant for the purpose of ruling on the dispute, by way of a measure of organisation of procedure or a measure of inquiry, pursuant to Article 91(b) and Article 92(3) of the Rules of Procedure. However, in accordance with Article 103(1) of those rules, the Court may consider that certain information contained in those documents is confidential and thus decide that they are not to be communicated to the other parties, in particular the applicants.

481 It follows that a decision by the Court to order the production of documents does not guarantee the applicants access to all of those documents if the Court considers that they contain confidential information.

482 In addition, in the present case, the Court, on 21 May 2021, by way of an order in respect of a measure of inquiry, requested the SRB to produce certain documents, including the confidential versions of the resolution scheme, valuation 2 and the ECB's assessment that Banco Popular was failing or likely to fail. In accordance with Article 103 of the Rules of Procedure, after examining the content of those documents, the Court considered that the information remaining redacted

in the versions of those documents published on the websites of the SRB and ECB was not relevant to the outcome of the present dispute. Accordingly, by order of 16 June 2021, the Court removed the confidential versions of those documents from the file.

483 Lastly, as regards the applicants' argument relating to the absence of judicial review during the resolution procedure, suffice it to note that that argument has been rejected in the analysis of the second part of the first plea in law.

484 Consequently, the second complaint must be rejected and, therefore, the second plea in law must be rejected as unfounded.

The third plea in law, alleging infringement of the right to property

485 The applicants claim that the SRB and the Commission infringed, without justification and in a disproportionate manner, their right to property enshrined in Article 17(1) of the Charter. They submit that the write-down of Banco Popular's share capital and the write-down and conversion of its capital instruments deprived the shares and bonds which the applicants held in Banco Popular of all economic value.

486 The Commission, the SRB, the Kingdom of Spain and Banco Santander submit, in essence, that the right to property enshrined in Article 17 of the Charter is not an absolute right and may be subject to restrictions justified by objectives of general interest, in accordance with Article 52(1) of the Charter. They argue that the contested decisions pursue an objective of general interest, namely to ensure the stability of the financial system, which justifies a restriction of the applicant's right to property.

487 Article 17(1) of the Charter provides that:

'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'

488 According to settled case-law, the right to property guaranteed by Article 17(1) of the Charter is not absolute and its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union. Consequently, as is apparent from Article 52(1) of the Charter, restrictions may be imposed on the exercise of the right to property, provided that the restrictions genuinely meet objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed (see judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 69 and 70 and the case-law cited; judgments of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 85, and of 23 May 2019, *Steinhoff and Others* v *ECB*, T-107/17, EU:T:2019:353, paragraph 100).

489 It follows that the right to property is not an absolute right, but that, in accordance with Article 52(1) of the Charter, cited in paragraph 131 above, it may be subject to limitations if they are provided for in the applicable texts, are necessary for the pursuit of a general objective and are proportionate to that objective.

490 It should be noted that, in Article 6 of the resolution scheme, the SRB decided, pursuant to Article 21 of Regulation No 806/2014, to write down and convert Banco Popular's capital instruments in accordance with the detailed rules set out in paragraph 73 above.

491 In addition, it follows, first, from recital 61 of Regulation No 806/2014 that limitations on the rights of shareholders and creditors should comply with Article 52(1) of the Charter and, second, from recital 62 of that regulation that interference with property rights should not be disproportionate.

492 According to Article 15(1)(a) of Regulation No 806/2014, concerning the general principles governing resolution, the shareholders of the institution under resolution bear first losses.

493 In that regard, the Court of Justice has held, as regards the shareholders of the banks, that, in accordance with the general rules applicable to the status of shareholders of public limited liability companies, they must fully bear the risk of their investments (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 73).

494 The Court of Justice has held, in the field of State aid, that since shareholders are liable for the debts of the bank up to the amount of its share capital, the fact that points 40 to 46 of the Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ 2013 C 216, p. 1) require that, in order to overcome a bank's capital shortfall, prior to the grant of State aid, those shareholders should contribute to the absorption of the losses suffered by that bank to the same extent as if there were no State aid, cannot be regarded as adversely affecting their right to property (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 74).

495 It must be held, by analogy, that the decision, in the resolution scheme, to write down and convert Banco Popular's capital instruments held by the applicants is the consequence of the fact that the shareholders of an entity must bear the risks inherent in their investments and of the fact that, since that entity is the subject of a resolution action because of its failure, those shareholders must bear the economic consequences of that failure.

496 In that regard, the General Court has already held that a measure consisting of reducing the nominal value of the shares of a Cypriot bank was proportionate to the objective pursued by that measure. The Court stated, first of all, that that measure was intended to contribute to the recapitalisation of the bank and that that measure was capable of contributing to the objective of ensuring the stability of the Cypriot financial system and that of the euro area as a whole. Next, it found that that measure did not exceed the limits of what was appropriate and necessary in order to achieve that objective, given that less restrictive alternatives were not feasible, or would not have allowed the expected outcome to be achieved. Finally, the Court considered that, in the light of the importance of the objective pursued, the measure did not create disproportionate disadvantages. It stated, in that regard, that shareholders of banks bear the full risk of their investments (judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 330).

497 In those circumstances, the General Court concluded that it cannot be considered that the reduction of the nominal value of the shares of that bank constituted a disproportionate and intolerable interference, impairing the very substance of the shareholders' right to property (judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 331).

498 In addition, it should be noted that it follows from the case-law cited in paragraph 137 above that financial services play a central role in the EU economy and that the failure of one or more banks is likely to spread rapidly to other banks either in the Member State concerned or in other Member States.

499 The Court of Justice has already held that, in view of the objective of ensuring the stability of the banking system in the euro area, and having regard to the imminent risk of financial losses to which depositors with the banks concerned would have been exposed if the latter had failed, certain restrictions on the right to property could be justified (see, to that effect, judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 74).

500 The Court of Justice has also held that, although there is a clear public interest in ensuring throughout the European Union a strong and consistent protection of investors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system (judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 91, and of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 54).

501 It must be noted that, in Article 4.2 of the resolution scheme, the SRB considered that the resolution was necessary and proportionate to the objectives laid down in Article 14(2)(a) and (b) of Regulation No 806/2014, namely to ensure the continuity of critical functions and to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline. It stated that winding up Banco Popular under normal insolvency proceedings would not achieve those objectives to the same extent. In Decision 2017/1246, the Commission expressly endorsed the reasons put forward by the SRB to justify the need for a resolution action in the public interest.

502 Thus, the resolution scheme, in so far as it was intended to preserve or restore Banco Popular's financial situation and, in particular, in so far as it constituted an alternative to the winding up of Banco Popular, met an objective of general interest within the meaning of Article 52(1) of the Charter, namely to ensure the stability of the financial markets.

503 The measures for the write-down and conversion of Banco Popular's capital instruments contained in the resolution scheme were part of that objective.

504 The applicants state that they do not call into question the compatibility of the SRM as provided for in Regulation No 806/2014 with Article 17 of the Charter. They maintain that the contested decisions unjustifiably affected their right to property, by raising three complaints. First, the contested decisions do not comply with the 'conditions provided for by law', secondly, those decisions impair the essence of their right to property by failing to provide for compensation and, thirdly, that impairment is disproportionate.

505 By their first complaint, the applicants submit that the interference with their right to property did not comply with the conditions laid down in law. In that regard, they rely on the failure to comply with the conditions laid down in Article 18(1)(a) and (b) of Regulation No 806/2014, the failure to comply with the conditions laid down in Article 21(1) of that regulation, the failure to carry out a proper valuation in accordance with Article 20 of that regulation, and the fact that the contested decisions were adopted without proper safeguard measures in respect of due process, and they refer to the arguments raised in the second, fourth, fifth and sixth pleas in law.

506 It is sufficient to note that the arguments raised in the second, fourth, fifth and sixth pleas in law have been rejected. It follows from the analysis of those pleas that the SRB and the Commission did not make a manifest error of assessment in the application of Articles 18, 20 and 21 of Regulation No 806/2014 and that the applicants' right to be heard was not infringed.

507 Consequently, the first complaint must be rejected.

508 By their second complaint, the applicants submit that the fact that they were deprived of their property without compensation infringes the essence of their right to property. They maintain that no independent valuation was carried out, nor was there an *ex post* definitive valuation as provided for in Article 20(11) of Regulation No 806/2014, which constitute the two specific 'safeguards' provided for by Regulation No 806/2014 in order to ensure the protection of Article 17 of the Charter, enabling them to be guaranteed fair compensation. They argue that an independent and full *ex ante* valuation enabling the value of the entity's assets and liabilities to be assessed was not carried out and that it could not be based on the fact that a resolution tool had already been chosen. They consider that, since there will be no *ex post* definitive valuation as provided for in Article 20(11) of Regulation No 806/2014, the 'safeguards' designed to protect shareholders' right to compensation have not been complied with. Valuation 3, provided for in Article 20(16) of Regulation No 806/2014, serves different purposes and the SRB cannot contend that it is sufficient.

509 In the first place, it should be noted that the applicants' arguments that valuation 2 was not 'fair, prudent and realistic' within the meaning of Article 20(1) of Regulation No 806/2014 and that it should have taken into account several possible resolution scenarios have already been rejected in the context of the analysis of the fourth plea in law. Next, it should be noted that, under Article 20(13) of Regulation No 806/2014, the SRB could rely on a provisional valuation in order to adopt the resolution scheme. Finally, it follows from the analysis of the fourth plea in law that the absence of an *ex post* definitive valuation within the meaning of Article 20(11) of Regulation No 806/2014 cannot affect the validity of the contested decisions.

510 In the second place, Regulation No 806/2014 provides for a mechanism for the compensation of the shareholders and creditors of an entity which is the subject of a resolution action, on the basis of the principle set out in Article 15(1)(g) of Regulation No 806/2014, which establishes that no creditor is to incur greater losses than would have been incurred if the entity subject to a resolution procedure had been wound up under normal insolvency proceedings.

511 In order to determine whether the shareholders and the creditors would have received better treatment if the entity concerned had entered into normal insolvency proceedings, Article 20(16) of Regulation No 806/2014 provides that a valuation is to be carried out after the resolution. According to Article 20(17) of Regulation No 806/2014, that valuation establishes whether there

is a difference between the treatment which the shareholders and creditors would have received if the institution had entered into normal insolvency proceedings at the time when the decision on the resolution action was taken and the actual treatment that they received in the resolution.

512 If, following that valuation, it is established that the shareholders or creditors suffered greater losses in the resolution than the losses they would have incurred during a winding-up under normal insolvency proceedings, Article 76(1) of Regulation No 806/2014 provides that the SRB may use the SRF in order to compensate them.

513 It follows that Regulation No 806/2014 establishes a mechanism designed to ensure fair compensation for the shareholders or creditors of the entity subject to resolution, in accordance with the requirements of Article 17(1) of the Charter.

514 In that regard, it must be noted that the references made by the applicants to the Commission's impact assessment confirm that that mechanism complies with the requirements of Article 17(1) of the Charter. According to the extract from that impact assessment cited by the applicants in the reply:

'The interference with the right of property is not disproportionate because the framework provides for a right to compensation for the affected shareholders and creditors. Shareholders and creditors are entitled to be compensated for the value of their shares or credits that they would be entitled to under normal liquidation of the company. A further safeguard is the requirements that the amount of compensation should be determined by reference to the value of the business as assessed by an independent valuer. Furthermore, compensation should ensure that shareholders and creditors do not receive less favourable treatment as a result of the application of the resolution tool or use of the resolution power than they would have received if this tool or power had not been used and the entire credit institution had instead entered insolvency under the applicable national law. In particular, where a creditor's claim remains with a credit institution from which assets, rights or liabilities have been transferred to another entity and the residual credit institution is wound up, the creditor should be compensated if the amount received in that winding-up is less than the creditor would have received in the insolvency of the institution if the transfer had not been made.

The above rules concerning compensation preserve the essence of the right to property. In fact if the resolution powers were not exercised, the failing company would undergo insolvency proceeding. Under bankruptcy law, the creditors are entitled to a proportional distribution of the proceeds obtained from the sale of the banking assets and the shareholders are entitled to the distribution of what assets remain after the payment of all creditors. This essence is preserved under the principles governing compensation. Therefore the restrictions do not disproportionately restrict the right to property.'

515 Furthermore, contrary to what the applicants appear to claim, the fact that they did not obtain compensation on the date of the resolution scheme is not sufficient to establish an infringement of their right to property, since Article 17(1) of the Charter does not provide for payment of compensation at the same time as the restriction of the right to property, but provides for payment in good time.

516 By their argument that the carrying out of an *ex post* definitive valuation provided for in Article 20(11) of Regulation No 806/2014 is necessary for their right to property to be respected, the applicants seem to submit that the amount of compensation which should be paid to the shareholders should be calculated in the light of the results of the *ex post* definitive valuation. They argue that the *ex post* definitive valuation is intended to determine the value of the entity's

assets and liabilities before the adoption of the resolution action and that the *ex post* definitive valuation serves purposes that differ from the purposes of the valuation 3 provided for in Article 20(16) of Regulation No 806/2014.

517 In the present case, it should be noted that, if the resolution scheme had not been adopted, the alternative was the winding-up of Banco Popular under normal insolvency proceedings.

518 In that regard, it should be noted that, in the field of State aid, the Court of Justice has held that the scale of losses suffered by shareholders of distressed banks will, in any event, be the same, regardless of whether those losses are caused by a court insolvency order because no State aid is granted or by a procedure for the granting of State aid which is subject to the prerequisite of burden-sharing (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 75).

519 The Court of Justice has stated that paragraph 46 of the Banking Communication provides that 'the "no creditor worse off principle" should be adhered to' and that 'subordinated creditors should therefore not receive less, in economic terms, than what their instrument would have been worth if no State aid were to be granted' (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 77).

520 According to the Court of Justice, it follows from that paragraph that the burden-sharing measures on which the grant of State aid in favour of a bank showing a shortfall is dependent cannot cause any detriment to the right to property of subordinated creditors that those creditors would not have suffered within insolvency proceedings that followed such aid not being granted. That being the case, it cannot reasonably be maintained that the burden-sharing measures, such as those laid down by the Banking Communication, constitute interference in the right to property of the shareholders and the subordinated creditors (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 78 and 79).

521 In addition, as regards securities, the amount of the compensation payable is calculated in relation to the true market value of those securities at the time of the adoption of the contested regulation, and not in relation to its nominal value or the amount the owner thereof hoped to receive at the time of its acquisition (see judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 314 and the case-law cited).

522 It must therefore be held, by analogy, that the application in the present case of the principle laid down in Article 15(1)(g) of Regulation No 806/2014, referred to in paragraph 510 above, according to which no creditor may be treated worse, guarantees the applicants fair compensation in accordance with the requirements of Article 17(1) of the Charter.

523 Contrary to what the applicants claim, the value of their investment must not be calculated in the light of the situation preceding the adoption of the resolution scheme, as that value might be following an *ex post* definitive valuation; the value of their investment is in fact the value in the event of the resolution scheme not having been adopted, namely a situation in which Banco Popular is wound up.

524 Furthermore, as the applicants acknowledge, the *ex post* definitive valuation provided for in Article 20(11) of Regulation No 806/2014 and valuation 3 provided for in Article 20(16) of that regulation are 'distinct'. The carrying out of an *ex post* definitive valuation is of no use for the purposes of valuation 3, the aim of which is to compare the actual treatment which Banco

Popular's shareholders received as a result of the resolution and the treatment which they would have received in the context of hypothetical insolvency proceedings. The applicants cannot therefore claim that, in the absence of an *ex post* definitive valuation, the SRB and the Commission had no basis for stating that 'reasonable' compensation would be paid.

525 Therefore, contrary to what the applicants submit, the fact that the SRB stated that, in the present case, no *ex post* definitive valuation would be carried out does not constitute an infringement of their right to property.

526 Furthermore, it should be noted that the applicants' line of argument is based on the incorrect assumption that, in the present case, they could have received compensation under Article 20(12)(a) of Regulation No 806/2014.

527 According to Article 20(12)(a) of Regulation No 806/2014,

'In the event that the *ex post* definitive valuation's estimate of the net asset value of an entity referred to in Article 2 is higher than the provisional valuation's estimate of the net asset value of that entity, the [SRB] may request the national resolution authority to:

(a) exercise its power to increase the value of the claims of creditors or owners of relevant capital instruments which have been written down under the bail-in tool'.

528 It is sufficient to note that that provision applies where the resolution tool applied is the bail-in tool provided for in Article 27 of Regulation No 806/2014. That was not the case here, however.

529 Consequently, the second complaint must be rejected.

530 By their third complaint, the applicants submit that, in any event, irrespective of whether the interference with their right to property does not respect the essence of that right, that interference is disproportionate.

531 According to settled case-law, the principle of proportionality, which is one of the general principles of EU law, requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgments of 30 April 2019, *Italy* v *Council* (*Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 55 and the case-law cited, and of 6 May 2021, *Bayer CropScience and Bayer* v *Commission*, C-499/18 P, EU:C:2021:367, paragraph 166 and the case-law cited). That principle is stated in Article 5(4) TEU and in Article 1 of the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and the FEU Treaty.

532 First, the applicants claim that the infringement of their right to property is disproportionate in so far as the contested decisions were adopted without the applicants first being heard.

533 As the SRB submits, the right to be heard is an autonomous procedural right the infringement of which does not automatically entail an infringement of the right to property guaranteed by Article 17(1) of the Charter.

534 In that regard, it must be noted that it follows from the analysis of the second plea in law, and in particular from paragraphs 160 and 161 above, that the Court has already held that the protection of the right to property enshrined in Article 1 of Protocol No 1 to the ECHR cannot be interpreted as meaning that the person concerned must, in all circumstances, be able to make his or her point of view known to the competent authorities prior to the adoption of measures adversely affecting his or her right to property.

535 In addition, it must be noted that the applicants have not put forward any argument to explain how the SRB's failure to hear the applicants prior to the adoption of the resolution scheme affected their right to property.

536 Secondly, as regards the applicants' argument that there was a disproportionate infringement of their right to property in so far as they were not entitled to compensation, it is sufficient to refer to the analysis of the second complaint.

537 Thirdly, the applicants merely assert that the SRB and the Commission have not demonstrated that the resolution tool adopted, by including the write-down and conversion of capital instruments, was the least restrictive solution in order to achieve a legitimate objective.

538 It is sufficient to note that that assertion is not based on any line of argument and is therefore unsubstantiated.

539 The third complaint must therefore be rejected.

540 It follows from all of the foregoing that, first, Banco Popular was failing or likely to fail and that there were no alternative measures capable of preventing that situation, secondly, in the absence of resolution, Banco Popular would have been the subject of normal insolvency proceedings and, thirdly, Banco Popular's shareholders had to bear the risk of their investments and that Regulation No 806/2014 provides for the possible payment of compensation in accordance with the no creditor worse off principle. Accordingly, it must be concluded that the decision to write down and convert Banco Popular's capital instruments in the resolution scheme does not constitute an excessive and intolerable interference impairing the very substance of the applicants' right to property, but must be regarded as a justified and proportionate restriction of their right to property, in accordance with the provisions of Article 17(1) and Article 52(1) of the Charter.

541 Consequently, the third plea in law must be rejected as unfounded.

The seventh plea in law, alleging infringement of the obligation to state reasons

542 The applicants claim that the Commission and the SRB infringed the obligation to state reasons by failing to provide the actual and specific reasons why they adopted the contested decisions.

543 Article 41(2)(c) of the Charter, relating to the right to good administration, provides that that right includes the obligation of the administration to give reasons for its decisions.

544 According to settled case-law of the Court of Justice, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measures in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review. It is not necessary for the

reasoning to specify all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgments of 8 May 2019, *Landeskreditbank Baden-Württemberg* v *ECB*, C-450/17 P, EU:C:2019:372, paragraphs 85 and 87 and the case-law cited, and of 21 October 2020, *ECB* v *Estate of Espírito Santo Financial Group*, C-396/19 P, not published, EU:C:2020:845, paragraph 41 and the case-law cited).

545 Furthermore, the degree of precision of the statement of the reasons for a measure must be weighed against practical realities and the time and technical facilities available for making the decision (see judgments of 6 November 2012, *Éditions Odile Jacob* v *Commission*, C-551/10 P, EU:C:2012:681, paragraph 48 and the case-law cited, and of 23 May 2019, *KPN* v *Commission*, T-370/17, EU:T:2019:354, paragraph 139 and the case-law cited; judgment of 27 January 2021, *KPN* v *Commission*, T-691/18, not published, EU:T:2021:43, paragraph 162).

546 In the first place, as regards the resolution scheme, the applicants claim that the SRB merely provided a redacted version of the resolution scheme and did not produce any evidence underlying that scheme. In the reply, the applicants add that they cannot make effective use of the legal remedies available to them because of the SRB's refusal to grant them access to the key documents that formed part of its reasoning, including an unredacted version of the resolution scheme.

547 It must be noted that the applicants do not refer to the content of the resolution scheme and do not explain which factors are insufficient to enable its scope to be understood. They do not state which part of the reasoning used by the SRB in the resolution scheme is not sufficiently clear.

548 It must therefore be held that, by those arguments, the applicants challenge the fact that they were not provided with a full version of the resolution scheme and the documents underpinning it. Those arguments have already been raised in the context of the second complaint of the second plea in law, relating to infringement of the right to effective judicial protection.

549 In that regard, it is sufficient to note that it follows from the analysis of the second complaint of the second plea in law that the applicants cannot claim that they have a right to receive communication of the full versions of the resolution scheme, valuation 2 or the other documents on which the SRB relied in order to adopt the resolution scheme.

550 In the second place, as regards Decision 2017/1246, the applicants submit that the Commission merely stated in its decision that it approved the SRB's conclusions, without any explanation as to the assessments it made to ensure that the applicable conditions were met and that the resolution tool proposed by the SRB was the most appropriate and proportionate tool.

551 It should be noted that recital 4 of Decision 2017/1246 states:

'The Commission agrees with the resolution scheme. In particular, it agrees with the reasons provided by the SRB of why resolution is necessary in the public interest in accordance with Article 5 of Regulation [No 806/2014].'

552 In addition, first, in recital 2 of Decision 2017/1246, the Commission referred to the fact that the SRB, in the resolution scheme, had stated that all conditions for resolution set out in the first subparagraph of Article 18(1) of Regulation No 806/2014 had been met with respect to Banco

Popular and that the SRB had assessed why resolution action was necessary in the public interest. Second, in recital 3 of Decision 2017/1246, the Commission stated that the resolution scheme, in accordance with Article 18(6) of Regulation No 806/2014, placed Banco Popular under resolution and determined the application of the sale of business tool and that the resolution scheme also provided reasons why all those elements were adequate.

553 It follows that the Commission, in Decision 2017/1246, expressly referred to the grounds on which the SRB had considered that the conditions for the adoption of the resolution scheme had been met and that the sale of business tool should be applied. Thus, the approval of the resolution scheme in recital 4 of Decision 2017/1246 must be read in the light of the other recitals of that decision and concerns all of those grounds. In that recital, the Commission expressly stated that it agreed with the reasons set out in the resolution scheme justifying the adoption of a resolution action in respect of Banco Popular, in particular as regards the public interest criterion.

554 Thus, it must be held that the resolution scheme and the statement of reasons for it form part of the context in which Decision 2017/1246 was adopted, within the meaning of the case-law cited in paragraph 544 above.

555 As stated in paragraph 547 above, the applicants have not put forward any argument to establish that the resolution scheme is insufficiently reasoned.

556 In addition, it should be noted that, under Article 18(7) of Regulation No 806/2014, the Commission either 'endorses' the resolution scheme or objects to it with regard to the discretionary aspects of the resolution scheme.

557 It follows that, where, as in the present case, the Commission endorses the resolution scheme, the statement of reasons for its decision may be limited to indicating that it agrees with the reasons contained in the scheme. Any other additional justification for its endorsement may consist only of a repetition of the elements already contained in the resolution scheme. According to Article 18(7) of Regulation No 806/2014, the Commission must not repeat the SRB's analysis in its decision, but only endorse it.

558 Furthermore, in accordance with the case-law cited in paragraph 545 above, account must be taken of the very short period of time that was available to the Commission, under Article 18(7) of Regulation No 806/2014, to adopt its decision once the SRB had transmitted the resolution scheme.

559 Consequently, the seventh plea in law must be rejected as unfounded.

The eighth plea in law, alleging infringement of the principle of proportionality and of the principle of the protection of legitimate expectations

560 The applicants submit, in the alternative, that if the conditions laid down in Article 18 of Regulation No 806/2014 were met, the SRB and Commission, by selecting the sale of business tool and by departing from the 2016 resolution plan without justification, infringed the principle of proportionality and the principle of the protection of legitimate expectations.

561 In the application, the applicants state that they are unable to develop the present plea in law, since they did not have access to the relevant information, namely the unredacted version of the resolution scheme and the ECB's assessment that Banco Popular was failing or likely to fail. In the

reply, the applicants state that they are unable to put forward arguments concerning this plea. The SRB and the Commission have not explained their decision to refuse to comply with the 2016 resolution plan or why they did not instruct Deloitte to examine that issue.

562 According to Article 76 of the Rules of Procedure, the application initiating proceedings must contain, inter alia, the pleas in law and arguments relied on and a summary of those pleas in law. It must, accordingly, specify the grounds on which the action is based, with the result that a mere abstract statement of the grounds is not sufficient to satisfy the requirements of the Rules of Procedure. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary, without any further information. In order to ensure legal certainty and the sound administration of justice, it is necessary, if an action or, more specifically, a plea in law, is to be admissible, that the basic legal and factual particulars relied on be indicated coherently and intelligibly in the application itself (see judgments of 12 September 2018, *De Geoffroy and Others* v *Parliament*, T-788/16, not published, EU:T:2018:534, paragraphs 72 and 73 and the case-law cited, and of 8 May 2019, *PT* v *EIB*, T-571/16, not published, EU:T:2019:301, paragraph 109 and the case-law cited).

563 It must be noted that, as the applicants themselves state in the application and in the reply, the plea alleging infringement of the principle of proportionality and of the principle of the protection of legitimate expectations is not supported by any specific arguments. Therefore, since it has not been explained, it must be rejected as inadmissible.

564 In any event, as regards the principle of protection of legitimate expectations, in accordance with settled case-law, the right to rely on that principle presupposes that precise, unconditional and consistent assurances, originating from authorised, reliable sources, have been given to the person concerned by the competent authorities of the European Union. That right applies to any individual in a situation in which an institution, body or agency of the European Union, by giving that person precise assurances, has led him or her to entertain well-founded expectations (see judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 62 and the case-law cited; see also, to that effect, judgment of 16 December 2020, *Council and Others* v *K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 178 and the case-law cited).

565 It is sufficient to note that the applicants do not refer to any specific assurance capable of having led them to entertain expectations that the 2016 resolution plan would be applied.

566 Moreover, in so far as, according to the applicants, it is necessary to interpret their assertion, in the reply, that the SRB and the Commission have not explained their decision to depart from the 2016 resolution plan as constituting an argument alleging infringement of the obligation to state reasons, it is sufficient to refer, as did the Commission, the SRB and the Kingdom of Spain, to the grounds set out in recitals 19 to 22 of the resolution scheme, which are not disputed by the applicants.

567 Consequently, the eighth plea in law must be rejected as inadmissible.

The application for measures of organisation of procedure

568 By letter lodged at the Court Registry on 9 October 2018, the applicants requested the Court to order the SRB and the Commission, by way of a measure of organisation of procedure on the basis of Article 88 of the Rules of Procedure, to produce a certain number of documents, the list

of which is annexed to that application. The applicants state that the requested documents correspond to the factual arguments contained in the defence of the SRB and the Commission and that they must be disclosed so that the applicants can respond to them. In the absence of those documents, it is not possible for the applicants to respond to the defences or for the Court to assess the legality of the contested decisions.

569 The Commission and the SRB consider that that application does not comply with the requirements of Article 88(2) of the Rules of Procedure, in so far as the applicants have failed to explain why they were not able to submit that application previously and they have not set out precisely the reasons why the requested documents were necessary for purposes of the resolution of the dispute.

570 It must be noted that, by its order for a measure of inquiry of 21 May 2021, pursuant to Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, the Court ordered the SRB to produce certain documents referred to in paragraph 95 above. By order of 16 June 2021, the Court held that the documents produced by the SRB in their confidential version were not relevant to the resolution of the dispute. By contrast, the letter from Banco Popular to the ECB of 6 June 2017, without its annex, was communicated to the other parties.

571 As regards applications made by a party for measures of organisation of procedure or measures of inquiry, it must be recalled that the Court is the sole judge of any need to supplement the information available to it in respect of the cases before it (see judgment of 26 January 2017, *Mamoli Robinetteria* v *Commission*, C-619/13 P, EU:C:2017:50, paragraph 117 and the case-law cited; judgment of 12 November 2020, *Fleig* v *EEAS*, C-446/19 P, not published, EU:C:2020:918, paragraph 53).

572 It is important to note in that regard that, to enable the Court to determine the usefulness of measures of organisation of procedure, the party requesting them must identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings (see judgments of 28 July 2011 *Diputación Foral de Vizcaya and Others* v *Commission*, C-474/09 P to C-476/09 P, not published, EU:C:2011:522, paragraph 92 and the case-law cited, and of 20 March 2019, *Hércules Club de Fútbol* v *Commission*, T-766/16, EU:T:2019:173, paragraph 29 and the case-law cited).

573 In the present case, it must be noted that the information contained in the file and the explanations provided during the hearing are sufficient to enable the Court to give judgment, since it has been able to give a proper ruling on the basis of the forms of order sought, the pleas in law and the arguments put forward during the proceedings and in the light of the documents lodged by the parties.

574 It follows that the applicants' application for measures of organisation of procedure must be rejected, without it being necessary to rule on the admissibility of that application under Article 88(2) of the Rules of Procedure.

575 It must be concluded that the action must be dismissed in its entirety.

Costs

576 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay the costs incurred by the Commission, the SRB and Banco Santander, in accordance with the forms of order sought by the latter three parties.

577 Under Article 138(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. The Kingdom of Spain, the Parliament and the Council must therefore bear their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Mr Antonio Del Valle Ruíz and the other applicants whose names are listed in the annex to bear their own costs and pay the costs incurred by the European Commission, the Single Resolution Board (SRB) and Banco Santander, SA;**

3. **Orders the Kingdom of Spain, the European Parliament and the Council of the European Union to bear their own costs.**

Van der Woude Jaeger De Baere

Kreuschitz Steinfatt

Delivered in open court in Luxembourg on 1 June 2022.

E. Coulon G. De Baere
Registrar President

Table of contents

Legal framework 2

Background to the dispute and events subsequent to the action being brought 6

The situation of Banco Popular before the resolution scheme was adopted 6

Other facts prior to the adoption of the resolution scheme 8

The resolution scheme for Banco Popular of 7 June 2017 11

Facts subsequent to the adoption of the resolution decision 12

Procedure and forms of order sought 13

Law 15

The first plea in law, alleging that Article 18 of Regulation No 806/2014 infringes the right to be heard and the right to an effective remedy enshrined in Articles 41 and 47 of the Charter and infringes the principle of proportionality 17

The first part, alleging that Article 18 of Regulation No 806/2014 infringes the right to be heard 17

The second part, alleging that Article 18 of Regulation No 806/2014 infringes the right to an effective remedy 27

The third part, alleging that Article 18 of Regulation No 806/2014 infringes the principle of proportionality 29

The ninth plea in law, alleging that Articles 18 and 22 of Regulation No 806/2014 are unlawful in that they infringe the principles relating to the delegation of power 29

The fourth plea in law, alleging infringement of Article 20 of Regulation No 806/2014 35

The first complaint, relating to valuation 1 37

The second complaint, relating to valuation 2 38

The third complaint, relating to the absence of an ex post definitive valuation 43

The fifth plea in law, alleging infringement of Article 18(1)(a) and (b) of Regulation No 806/2014 44

The first part, alleging infringement of Article 18(1)(a) of Regulation No 806/2014 44

The second part, alleging infringement of Article 18(1)(b) of Regulation No 806/2014 48

The sixth plea in law, alleging infringement of Article 21(1) of Regulation No 806/2014 55

The second plea in law, alleging infringement of Articles 41 and 47 of the Charter 55

The first complaint, relating to the right to be heard 56

The second complaint, relating to the right to effective judicial protection 59

The third plea in law, alleging infringement of the right to property 65

The seventh plea in law, alleging infringement of the obligation to state reasons 72

The eighth plea in law, alleging infringement of the principle of proportionality and of the principle of the protection of legitimate expectations 74

The application for measures of organisation of procedure 75

Costs 77